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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL SCHMIDT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Will a naturalized citizen be deprived of citizenship on summary judgment because, without actual knowledge or participation in any act of persecution, that citizen had the status of guard outside the walls of a German prison within which wrongful acts occurred.

2. Is actual knowledge of persecution required as part of the proof for denaturalization.

3. May a summary judgment be entered denaturalizing a citizen when the citizen denies, under oath, any knowledge of any act of persecution by anyone at the prison outside of which he was employed as a guard, and when there is no evidence that he did have such knowledge.

4. Is it sufficient to denaturalize that a citizen was a member of the "SS" during World War II, in a unit which had a guard function at a German prison within which persecution occurred, without any showing that the citizen had actual knowledge of any act of persecution.

5. A conflict exists between the Ninth and Second Circuits, which hold that "persecution" requires some proof of an act assisting in persecution, and the Seventh Circuit, which holds that presence at a place where persecution occurs (even without knowledge) is persecution.

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OPINIONS BELOW AND STATEMENT OF JURISDICTION

1. In a 2-1 decision, dated January 30, 1991 (Appendix A), the United States Court of Appeals for the Seventh Circuit affirmed the January 3, 1990 Order (Appendix D) of the Honorable Judge Paul E. Plunkett of the United States District Court for the Northern District of Illinois, Eastern Division, granting summary judgment in favor of the Government denaturalizing the defendant, Michael Schmidt. Jurisdiction of the District Court in denaturalization proceedings is based on 8 U.S.C. sec. 1451.

2. By Order dated June 4, 1991, the United States Court of Appeals for the Seventh Circuit denied Petitioner's Request for Rehearing with Suggestion for Rehearing En Banc. (A copy of which is attached as Appendix C.)[1]

3. Jurisdiction of this Court is based on 28 U.S.C. sec. 1254(1), providing for review by writ of certiorari to the Court of Appeals.

STATUTES INVOLVED

1. Section 13 of the Displaced Persons Act of 1948, Pub. L. No. 80-774, ch. 647, 62 Stat. 1009, 1014, as amended by Pub. L. No. 81-555, ch. 262, 64 Stat. 219, 227 (1950)

"No visas shall be issued under the provisions of this Act, as amended, to any person who is or has been a member of the Communist Party, or to any person who adheres to, advocates, or follows, or who has adhered to, advocated, or followed, the principles of any political or economic system or philosophy directed toward the destruction of free competitive enterprise and the revolutionary overthrow of representative governments, or to any person who is or has been a member of any organization which has been designated by the Attorney General of the United States as a Communist organization, or to any person who is or has been a member of or participated in any movement which is or has been hostile to the United States or the form of government of the United States, or

[1] Appendix references to the "Memorandum Opinion and Order" of the District Court shall be "DC p.-"; Appendix references to the Opinion of the Seventh Circuit shall be "CA p.-".

to any person who advocated or assisted in the persecution of any person because of race, religion, or national origin, or to any person who has voluntarily borne arms against the United States during World War II. Upon arrival at the port of entry in the United States, every person eighteen years of age or older authorized to be admitted under this Act, shall take and subscribe an oath or affirmation that he is not and has never been a member of any organization or movement named in this section, and shall be liable to prosecution for perjury if such oath or affirmation is willfully false. If any person not entitled to a visa under this section shall nevertheless gain admission to this country, in addition to the penalty above-mentioned, such person shall, irrespective of the date of his entry, be deported in the manner provided by sections 19 and 20 of the Immigration Act of February 5, 1917, as amended."

2. 8 U.S.C. sec. 1427(a)

"Requirements of Naturalization

(a) Residence

No person, except as otherwise provided in this subchapter, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time, and who has resided within the State in which the petitioner filed the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the period referred to in this subsection has been and still is a person of good moral character, attached to the principles of

the Constitution of the United States, and well disposed to the good order and happiness of the United States."

3. 8 U.S.C. sec. 1451(a): "Revocation of naturalization

(a) Concealment of material evidence; refusal to testify

It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefore, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: *Provided*, That refusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any proceeding before a congressional committee concerning his subversive activities, in a case where such person has been convicted of contempt for such refusal, shall be held to constitute a ground for revocation of such person's naturalization under this subsection as having been procured by concealment of a material fact or by willful misrepresentation. If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence."

STATEMENT OF THE CASE

Petitioner Michael Schmidt, a naturalized citizen of the United States for twenty-three years, had his citizenship revoked, on summary judgment, on January 3, 1990. The District Court, having jurisdiction pursuant to 8 U.S.C. sec. 1451(a), granted the Government's motion for summary judgment, finding Schmidt assisted in the persecution of "any person because of race, religion, or national origin" based on Schmidt's service in the SS as a guard at Sachsenhausen. The District Court found that Schmidt's position as a guard was *alone* sufficient to establish Schmidt's assistance in persecution, stating "it is irrelevant whether . . . he ever personally committed any atrocities," DC p. 36, and that "whether he knew that they [prisoners] were unjustly imprisoned, that their living conditions were atrocious, or that other guards abused them is irrelevant." DC p. 37. Because of this finding, the District Court held Schmidt was not lawfully admitted into the United States and, therefore, could not lawfully obtain citizenship, relying upon the Displaced Persons Act of 1948 (see, "Statutes Involved," *supra*).

On appeal, the Seventh Circuit affirmed. Following its reading of *Fedorenko v. United States*, 449 U.S. 490 (1981), the Court stated "it is clear that service as an armed concentration camp guard constitutes assisting in persecution under the [Displaced Persons Act]." CA p. 9. The majority dismissed Schmidt's evidence and argument that he did not know of the acts occurring behind walls he was not permitted to pass, and that he brought no harm to anyone. The Court stated: "Whether or not Schmidt personally engaged in acts of violence, however, does not affect our conclusion that he assisted in persecution," CA p. 11.

In a dissenting opinion, Judge Pell noted the lack of evidence that Schmidt knew of or participated in any acts of persecution. Disagreeing with the majority, Judge Pell stated "I cannot conceive how a person can be rendering assistance in persecution without some showable knowledge, or at the very least evidence of facts known to him which could lead only to a conclusion that the work prisoners were being persecuted." CA p. 14. Judge Pell disagreed with the majority's opinion that *Fedorenko* removed the requirement for personal involvement in or knowledge of acts of persecution; and, stating "[o]ur system of justice that guilt should not be predicated on anything less than a fair trial is too important to tolerate any deviation or diminution," maintained that Schmidt was entitled to a trial. CA pp. 15-16.

The evidence concerning Schmidt which the District Court did receive demonstrated Schmidt is a Romanian born ethnic German. His parents, now deceased, were farmers. His education ended at age fifteen (15), with confirmation in the Church. After that, he worked on his Father's farm in the Scharosch District.

The Schmidt Family had no radio and did not receive a newspaper. Prior to 1943, Schmidt had not heard of the "SS". He belonged to no political groups of any kind. He did belong to Lutheran Church groups.

Schmidt attended a German recruitment meeting. The young men were told that if they joined the German military they would not be subject to the Romanian draft. Schmidt understood that the Romanian draft was being taken over by the Germans as it applied to ethnic Germans.

Schmidt reported for his medical and appeared before three (3) German officers. After considering his diminutive size, his papers were torn up and he was told to go away.

Schmidt went home and continued to work on his Father's farm.

Sometime later, Schmidt received a notice to report "to the neighbor town for draft." A friend had signed up in Schmidt's absence at a subsequent meeting. That paper did not mention the SS; Schmidt understood that he was to become a "German soldier." He did not know at the time of the division of the German military into SS and Wehrmacht.[2]

Schmidt got on the train to Vienna on June 20, 1943. He was then shipped to Oranienburg, a Suburb of Berlin, in civilian clothes. There he was given a uniform and sworn in. Schmidt knew that he was in the SS, and the overall unit which he recalls is "Goetz von Berlichingen." Schmidt served with the same squad leaders, soldiers and officers until wounded in combat in November, 1944. Some of his colleagues had "Goetz von Berlichingen" on their uniforms, some did not.

Schmidt began his "boot" training at Oranienburg sometime in July, 1943. He had small arms and grenade training, marching and military discipline. Schmidt did not receive political training in what the examiner called "Nazi philosophy." During his training period, which lasted six (6) to eight (8) months, he would also escort prison work parties from the gate at Sachsenhausen to places of work in the Oranienburg community. The prisoner foreman knew where to go; at times he would be the only guard, and at other times there were other guards. The prisoners and guards would walk to work through residential areas of Oranienburg. The work was principally in a machine

[2] The Germans generally assigned ethnic Germans from other countries to the SS, with Germans going into the Wehrmacht.

shop or, in the Fall, on farms. The prisoners would bring back produce to the prison.

Other than in training, Schmidt never fired his weapon. Schmidt had no rank; in his words, he was "Soldier, plain." His barracks were across the street from the Sachsenhausen prison, in Oranienburg. The guards who worked inside the camp were in other barracks and other units, as were intelligence units and interpreters. Schmidt never saw over the prison wall and was never inside. He was, by regulation, forbidden to go inside. Schmidt never saw a prisoner die, never saw a dead prisoner and never saw a prisoner beaten or harmed.

Schmidt knew of homosexual prisoners; he thought that they wore purple patches. He did not know what other people were there. Specifically, he did not know of Sachsenhausen as a place for the imprisonment of Jews. It was his understanding that prisoners were there, because of some violation of German law, which he did not claim to understand.

In August, 1944 (after the Normandy invasion and the attempt on Hitler's life), Schmidt's unit was ordered into combat. In Schmidt's first battle he was severely wounded, suffering a loss of a portion of his arm. He did not know where he was; the prosecutor suggested "Lorraine", which was then Germany, but is now France. He was hospitalized, and was captured by the British Army at the end of the War, in May, 1945.

Schmidt received his certificate of naturalization in 1968, after immigrating to the United States from Germany in 1952. For the nearly forty years Schmidt has lived in the United States, he worked as a janitor in Chicago, Illinois and is now retired. Schmidt is married with two children, and one grandchild.

ARGUMENT

A.

THIS COURT HAS NEVER HELD THAT DENATURALIZATION WITHOUT PROOF OF FAULT IS THE LAW OF THE LAND. THE SEVENTH CIRCUIT HAS NOW SO HELD. THIS MAKES CITIZENSHIP DEPENDENT ON STATUS, NOT ON CONDUCT, AND IS WRONG.

All of the prison-camp guard cases in which denaturalization has been ordered or considered have involved some consideration of the acts of the guard-now-citizen. In *Kungys v. United States*, 485 U.S. 759 (1988), the Government attempted to show that the citizen had acted to assist the Nazis in the mass arrest and execution of Jews in Lithuania. In *Fedorenko v. United States*, 449 U.S. 490 (1980), the citizen fired a rifle at fleeing prisoners, and had direct knowledge of the persecution and murder of multitudes of prisoners. In no case was there a citizen who lost his citizenship only because of his status, and not because of his conduct.[3]

We emphasize that this case is not here on a claim of visa fraud; it is here because the Court held that it constituted persecution under the Displaced Persons Act ("DPA") for Michael Schmidt to be in an SS uniform at

[3] The issue of assistance in persecution arose in *Fedorenko* in the context of determining whether a misrepresentation on an application for a visa was material. If Fedorenko's "particular conduct" constituted assistance in persecution, the conduct would be material to the decision to grant a visa; and, misrepresentation of this conduct would be grounds to revoke his citizenship. In Schmidt's case, however, he disclosed his service in the SS during the war at every stage of the naturalization process. Summary judgment was entered only on the "persecution" charge.

the outer perimeter of the Sachsenhausen prison near Berlin in 1943. There is no claim that Schmidt persecuted personally, and no proof at all that he had knowledge of anyone else persecuting. The prison was in a built-up urban area at Oranienburg, a Berlin suburb, and was not in the isolated Eastern countryside, as were the "death" camps Auschwitz and Treblinka. No automatic inference arises from presence such as might arise in the case of a guard at Treblinka.

The lower Courts held that presence in the uniform of the SS at the prison in a guard capacity constitutes "persecution." This Court has said, in *Fedorenko*, that we should focus on "whether particular conduct can be considered assisting in the persecution of civilians." 449 U.S. at 513. The Court here focused only on the status, and not on conduct.

We submit that it is important to all naturalized citizens and their descendants . . . all native born Americans, of whom there are many . . . whether or not status and presence, without more, is sufficient for summary judgment denaturalization. If so, the ruling will have long and grave consequences for many families, and, if good for America, such good will be hard to perceive. If not, then naturalized citizens who are not war criminals and who had no knowledge of the prohibited persecution can, at least, know that they will not be deprived of citizenship after forty years without trial focused on their conduct.

The Seventh Circuit has pared back the *Fedorenko* focus on conduct to such an extent that it now applies a *per se* rule: a prison guard, regardless of his individual conduct or knowledge of the conduct of others, is deemed to have assisted in persecution.

Referring to cases in which there was direct evidence of persecution or knowledge of persecution, the District Court stated "it is irrelevant whether Schmidt voluntarily joined the SS and whether he ever personally committed any atrocities. . . Whether he knew [the prisoners] were unjustly imprisoned, that their living conditions were atrocious, or that other guards physically abused them, is irrelevant. . . No proof of actual knowledge need be presented." (DC pp. 36, 37, 38). *United States v. Kairys*, 782 F.2d 1374 (7th Cir. 1986), *Schellong v. I.N.S.*, 805 F.2d 655 (7th Cir. 1986) and *Kulle v. I.N.S.*, 825 F.2d 1188 (7th Cir. 1987) were cited in support of this "*per se*" rule. The District Court then held that Schmidt's guard service alone was sufficient to revoke his citizenship, stating:

> Therefore, we hold that no proof that Schmidt knew precisely what was going on within the camp is necessary to find that he assisted in the persecution that was in fact occurring. We hold that the government is entitled to summary judgment on Count I, which seeks denaturalization on the ground that Schmidt was not lawfully admitted into the United States because he in fact assisted in the persecution of persons because of their race, religion or national origin *by serving as an armed guard at Sachsenhausen concentration camp.* (DC p. 38, emphasis added).

Schmidt argued on appeal that the Government presented no evidence that he, Michael Schmidt, persecuted anyone while a prison guard, or that he knew that persecution of civilians even took place at Sachsenhausen. The Court summarily dismissed Schmidt's argument.[4] In re-

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[4] Although the position of the Ninth Circuit in *Laipenieks v. I.N.S.*, 750 F.2d 1427 (9th Cir. 1985) (discussed *infra*), focusing on the individual's conduct, was raised and argued in Schmidt's briefs, and was cited in the dissenting opinion of Judge Pell, the majority opinion ignored *Laipenieks*.

jecting Schmidt's plea to evaluate him as an individual rather than simply "a guard," the Seventh Circuit professed to rely on *Fedorenko*, stating: "As we held in *Kulle* and the Supreme Court held in *Fedorenko*, an armed guard at a Nazi concentration camp is not eligible for a visa under the Displaced Persons Act." CA p. 12. The Seventh Circuit based its conclusion on its prior finding in *United States v. Kairys*, 782 F.2d 1374, 1378 (7th Cir. 1986) that "*Fedorenko* continues to stand for the proposition that service as an armed guard equals persecution," CA p. 10, and its finding in this case, again premised on its reading of *Fedorenko*, that "it is clear that service as an armed concentration camp guard constitutes assisting in persecution under the DPA." CA p. 9. Thus, *Fedorenko* is read to focus only on status and not on conduct or knowledge.

In essence, the Seventh Circuit took Justice Marshall's description of Fedorenko in footnote 34 of the decision and removed its most essential detail—the detail which focuses on the persecutive conduct of the individual in question (Fedorenko admitted to shooting at prisoners). The other characteristics listed by Justice Marshall in describing Fedorenko, that he wore a uniform, carried a gun and was paid and given leave, are not acts of persecution, but did show he worked willingly at a death camp.

This short-hand analysis, based on status, and not on conduct or knowledge, creates a "no fault" denaturalization that simplifies the procedure at a destructive cost to any perception of the value of citizenship by naturalization. As Justice Stevens observed in a concurring opinion, "American citizenship is 'a right no less precious than life or liberty.' " *Kungys v. United States*, 485 U.S. 759, 785 (1988) (citation omitted). Considering what is at stake,

expediency and convenience for the prosecution must not be a consideration.

This cheapening of the process considered due for the naturalized citizen contradicts prior decisions of this Court, requiring an extraordinary burden of proof such that citizenship may be revoked only if the Government establishes its case by "clear, unequivocal and convincing" proof, which "does not leave the issue in doubt." *Fedorenko*, 499 U.S. at 505 citing *Schneiderman v. United States*, 320 U.S. 118, 125 (1942), and quoting *Maxwell Land-Grant Case*, 121 U.S. 325, 381 (1886). Justice Marshall observed in *Fedorenko*:

> our decisions have recognized that the right to acquire American citizenship is a precious one, and that once citizenship has been acquired, its loss can have severe and unsettling consequences. . .
>
> Any less exacting standard would be inconsistent with the importance of the right that is at stake in a denaturalization proceeding.

449 U.S. at 506-507 (citations omitted).

Justice Stevens, stated in *Kungys*: "Without evidence of any wrongdoing before he came to the United States in 1948 or after he acquired his citizenship in 1954, the revocation of petitioner's citizenship—a punishment that is tantamount to exile or banishment—is patently excessive." 485 U.S. at 791.[5] The reason for this is clear:

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[5] Justice Brennan, in *Kungys*, also emphasized the need for the Government to carry its extraordinary burden of proof by *producing evidence* of a disqualifying fact, stating: "a presumption of ineligibility does not arise unless the Government produces evidence sufficient to raise a fair inference that a statutory disqualifying fact actually existed." 485 U.S. at 783.

> To take away a man's citizenship deprives him of a right no less precious than life or liberty, indeed of one which today comprehends those rights and almost all others. To lay upon the citizen the punishment of exile for committing murder, or even treason, is a penalty thus far unknown to our law and at most but doubtfully within Congress' power. US Const, Amend VIII. Yet by the device or label of a civil suit, carried forward with none of the safeguards of criminal procedure provided by the Bill of Rights, this most comprehensive and basic right of all, so it has been held, can be taken away and in its wake may follow the most cruel penalty of banishment.
>
> No such procedures could strip a natural born citizen of his birth right or lay him open to such a penalty.

Klapprott v. United States, 335 U.S. 601, 616-617 (1949). This noble language is surely inconsistent with a legal system that will terminate citizenship on a status test.

The Seventh Circuit's analysis attributes characteristics of the group, rightly or wrongly, to the individual, and misreads *Fedorenko* beyond its holding. It is based on the false premise that "we know what **they** did and since you are one of **them**, you must have done it too." Such assumptions are repugnant to our system of justice. *See Schneiderman v. United States*, 320 U.S. 118 (recognizing "infirmities of proof by imputation"); *Baumgartner v. United States*, 322 U.S. 665 (1944). Furthermore, an individual's freedom to rise above the worst of those in his assigned group is destroyed when the individual's conduct is "irrelevant."

Finally, the depravity of the conduct of the group does not justify acceptance of a status test. Because denaturalization proceedings have been equated with criminal pro-

ceedings,[6] a contemporary example from the criminal law is illustrative. Our society is continually waging a "war on drugs." We enact tough laws, we increase our police forces, we build more prisons, all in an effort to prevent the devastation of drugs. And, in this war, we in cities like Chicago "know" certain things, such as gang involvement in the sale and distribution of drugs. Yet, despite the fact that we "know" gang groups sell drugs to our children in schoolyards, and that we "know" gangs continuously engage in drug related violence among themselves and against others, we still focus on the conduct of the individual and not on his association. This protection of the individual, accorded to citizen and non-citizen alike, is fundamental to the freedoms of our society. It is part of our unique concept of due process and a jurisprudence which focuses on what an individual has done instead of who he or she is; it is one of the invaluable tenets which demonstrates the difference between our society and the Nazis. Their view was to deal in groups; they did not "focus on the individual." Their view, in its ultimate imposition, set the record for inhumanity. We should not take even the first step.

Thus, because the misreading of *Fedorenko* has resulted in the application of a status based test, we ask this Court to issue its writ and to hold that denaturalization must be based on conduct or knowledge, and not on status.

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[6] "because of the grave consequences incident to denaturalization proceedings we have held that a burden rests on the Government to prove its charges in such cases by clear, unequivocal and convincing evidence which does not leave the issue in doubt. . . This burden is substantially identical with that required in criminal cases—proof beyond a reasonable doubt. *Klapprott v. United States*, 335 U.S. at 611-612 (citations omitted).

B.

THERE IS A CONFLICT BETWEEN THE CIRCUITS AS TO WHETHER PROOF OF AN ACT OF PERSECUTION IS REQUIRED.

An individual residing within the jurisdiction of the Seventh Circuit of the United States Court of Appeals may have his or her citizenship revoked based on who that individual is—to which group he or she belongs or may be assigned—and not based on that individual's actions. The Seventh Circuit says that being a prison guard is alone sufficient to support revocation of an individual's United States citizenship. The Second and Ninth Circuits require proof that an individual personally participated in acts of persecution before it will revoke citizenship or permit deportation. This is a conflict which should be resolved.

1. The Seventh Circuit.

The Seventh Circuit in Schmidt's case found proof of bad conduct or knowledge unnecessary because the individual's actions are irrelevant, stating: "even if Schmidt personally did not participate in the brutal acts committed at Sachsenhausen, the fact of his armed, uniformed service is sufficient to establish that he assisted in persecution." CA pp. 10-11. The Court also held that his knowledge of wrongs done by others is irrelevant. No other Court has gone so far to trivialize citizenship.

In *United States v. Kairys*, 782 F.2d 1374 (7th Cir. 1986), the Seventh Circuit stated that, in its view of *Fedorenko*, an individual's conduct is irrelevant to his denaturalization proceeding:

> In *Fedorenko*, the Supreme Court *held* as a matter of law that service as a Nazi concentration camp guard equaled persecution of civilians for purposes

> of the DPA *without proof of personal involvement in atrocities*. (449 U.S. at 512-13 n. 34, 101 S.Ct. at 750, n.34).

782 F.2d at 1377, n.3 (emphasis added). *Kairys* did not, however, go to the extent of "no fault denaturalization" found in Schmidt's case.

Despite the Supreme Court's use of the phrase "particular conduct," and its examination of what certain individuals did, the Seventh Circuit determined the Supreme Court *held* that no proof of personal involvement in persecution is required to revoke citizenship. In *Schmidt*, this rule is extended to say that no *knowledge* of persecution need be shown.

The Court, in *Schellong v. I.N.S.*, 805 F.2d 655, 661 (7th Cir. 1986), rejected the positions of the Second and Ninth Circuits, discussed infra, which require proof of active or personal participation, stating:

> Insofar as these cases hold that personal involvement in atrocities is necessary to have assisted in persecution for purposes of the DPA or the Holtzman Amendment, they conflict with *Fedorenko*, 449 U.S. at 512, n.34, 101 S.Ct. at n.34 [sic].

The Seventh Circuit does not view denaturalization as particularly significant; in *Kulle v. I.N.S.*, 825 F.2d 1188 (7th Cir. 1987), the Court dismissed a due process claim by noting that "[t]his is not a criminal proceeding and the 'punishment' is not hanging." 825 F.2d at 1193. In *Kulle*, actual knowledge of persecution arose from presence for a long time at a concentration camp, rank and participation in a movement of prisoners on open train cars in midwinter from Gross Rosen to Mauthausen under inhumane conditions. That level of proof does not exist in Private Schmidt's case.

The Seventh Circuit thus holds that any member of the group of persons who guarded German prisons during World War II assisted in persecution, whether or not they did a persecutorial act, and whether or not such person had knowledge of persecution.

2. The Second Circuit.

In *United States v. Sprogis*, 763 F.2d 115 (2d Cir. 1985), the Second Circuit considered whether a naturalized United States citizen from Latvia, who was an Assistant Chief of Police for a Latvian town during the Nazi occupation of his area, had assisted the Nazi persecution of Jews. The Second Circuit examined cases involving civilian persecution and concluded:

> The clearest cases of assistance in persecution have been those in which an individual, often while employed at a concentration camp, has *personally arrested or fired* on detained civilians, or has ordered others to do so. . . In other cases, courts have characterized less hostile conduct as assistance in persecution, but in each of those cases, the individual condemned as a persecutor had *actively participated* in some act of oppression directed against persecuted civilians. *Sprogis*, 763 F.2d at 122 (citations omitted, emphasis added).

Sprogis admitted he was a ranking police officer while the Nazis occupied his area and detained and executed Jews. He also admitted he was present while Jews on their way to an extermination area were detained by his policemen, subject to his orders, at his police station.[7] Yet, based on the evidence, the Court concluded that Sprogis

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[7] Whether he gave the order to guard the Jews was controverted at trial. 763 F.2d at 119.

was simply present while the Jews were detained, that any other acts were just administrative in nature[8] and that "these were not acts of oppression. They do not amount to the kind of *active assistance* in persecution which the [Displaced Persons Act] condemns." 763 F.2d at 122 (emphasis added). The Second Circuit then affirmed the District Court's decision that "the government failed to prove clearly, unequivocally and convincingly that Sprogis, while serving as a police officer, personally assisted in persecuting civilians." 763 F.2d at 123.

Thus, despite the assistance of the local police, of which Sprogis was not only a member but a supervising officer, in the Nazi persecution of Jews, the Second Circuit focused on the conduct of Sprogis and determined that he did not personally assist in any of the atrocities committed by either the Nazis or the local police and civilians. *Sprogis* focuses on the kind and degree of the citizen's conduct. *Schmidt* focuses only on status.

3. The Ninth Circuit.

The Ninth Circuit has required proof of active personal involvement in acts of persecution even when less than United States citizenship is at stake. In *Laipenieks v. Immigration and Naturalization Service*, 750 F.2d 1427 (9th Cir. 1985), the petitioner was a Latvian immigrant, admitted in the United States in 1960. He was never naturalized. The Immigration and Naturalization Service ("INS") brought deportation proceedings against him

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[8] The Nazis confiscated Jews' property when they were removed from their homes and taken to be executed. Sprogis signed papers recording the disposition of this property. Sprogis also paid farmers who had transported Jewish prisoners to the police station and recorded these payments. 763 F.2d at 122.

alleging that he assisted in the persecution of persons on the basis of political opinion. Laipenieks was accused of beating prisoners while a member of the Latvian Political Police (the "LPP"), an organization formed to investigate and arrest those who participated in atrocities while the Soviet Union occupied Latvia from June, 1940 until Nazi occupation in June, 1941. The INS contended Laipenieks' assistance in persecution rendered him deportable under section 241(a)(19) of the Immigration and Nationality Act, 8 U.S.C. sec. 1251(a)(19).

The Ninth Circuit first analyzed the relationship and similarity of purpose of Sec. 1251(a)(19) to Section 10 of the Displaced Persons Act.[9] Quoting footnote 34 of *Fedorenko*, the Ninth Circuit noted the Supreme Court's rejection of the "voluntariness" analysis and observed: "*Fedorenko* stated that the proper analysis under the statute was whether the *acts of the individual* amounted to assisting in the persecution of civilians." 750 F.2d at 1431 (emphasis added).

The Court then analyzed the meaning of "assisting in persecution" through examination of *Fedorenko*, cases applying section 10 of the DPA after *Fedorenko*, as well as the statutory history of Section 1251(a)(19), and concluded:

> We find that the language and intent of Section 1251(a)(19) requires that deportability may only be sustained when the evidence establishes that the individual in question personally ordered, incited, assisted or otherwise participated in the persecution of individuals . . .

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[9] The Court noted the DPA renders a person ineligible for displaced person status if he "assisted the enemy in persecuting civil[ians] . . ." 750 F.2d at 1430, citing *Fedorenko*, 449 U.S. 490.

> Second, the intent of the legislation demonstrates that *active personal involvement* in persecutorial acts needs to be demonstrated before deportability may be established. . .
>
> In sum, guided by *Fedorenko*, the language of the statute, and the legislative intent, we find that Section 1251(a)(19) requires in the instant case, that the government provide proof of personal active assistance or participation in persecutorial acts before deportability may be established.

750 F.2d 1431-1432 (emphasis added).

There was evidence at Laipenieks' deportation hearing that the group to which he belonged, the LPP, collaborated with the Nazis to apprehend Communists and other suspected Soviet sympathizers. There was further evidence that individuals were imprisoned by the LPP for political beliefs. This evidence was the basis of the decision of the Board of Immigration Appeals ("BIA") to reverse an Immigration Judge and require deportation. However, in reversing the BIA, the Ninth Circuit stated:

> First, we note that the BIA's conclusion that the "*LPP* assisted and participated in the persecution" of individuals misstates the requirements of deportability. In order to establish deportability under Section 1251(a)(19), the *individual* must be found to have participated or assisted the *organization* in persecutorial acts.

Laipenieks, 750 F.2d at 1435 (emphasis in original).

Thus, the Ninth Circuit, like the Second Circuit, rejected the group guilt analysis and focused the examination of whether an individual assisted in persecution on *that individual's* conduct. Moreover, the focus on the individual does not change even when a group to which the individual belongs is proven to have assisted in persecution.

We submit that the conflict is clear, that the issue is important and that it should be resolved.

CONCLUSION

The Seventh Circuit in *Schmidt* has gone beyond any other court in holding knowledge of or personal involvement in persecution is not necessary to revoke an individual's citizenship. The Court based this extension on its reading of *Fedorenko*. *Fedorenko*, however, did not so hold; indeed, the Supreme Court there required the focus to be on an individual's "particular conduct." This expansive reading of *Fedorenko* not only goes beyond the clear language and intent of *Fedorenko* but also creates a conflict between the Circuits in application of a critical part of the law of denaturalization.

Thus, for the reasons stated above, we respectfully request that the Supreme Court issue its writ.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 90-1070

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL SCHMIDT,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 9475—**Paul E. Plunkett,** *Judge.*

ARGUED SEPTEMBER 5, 1990—DECIDED JANUARY 30, 1991

Before BAUER, *Chief Judge*, WOOD, JR., *Circuit Judge*, and PELL, *Senior Circuit Judge.*

BAUER, *Chief Judge.* The constitution empowers Congress "[t]o establish an uniform Rule of Naturalization." Article I, sec. 8, cl. 4. Any alien who seeks to acquire the "precious right" of American citizenship must meet all the requirements fixed by Congress. *Schneiderman v. United States*, 320 U.S. 118, 122 & 131 (1943). One of the requirements Congress established for citizenship is entry into the United States by means of a legally procured immigration visa. Section 13 of the Displaced Persons Act of 1948, Pub. L. No. 80-774, ch. 647, 62 Stat. 1009, *as amended by* Pub. L. No. 81-555, ch. 262, 64 Stat. 219 (1950), provides that any individual who advocated or as-

sisted in the persecution of persons because of race, religion or national origin is ineligible to obtain a visa. In the judgment appealed from here, the district court revoked Michael Schmidt's citizenship and canceled his certificate of naturalization pursuant to 8 U.S.C. § 1451(a) of the Immigration and Nationality Act.[1] The district court found that because Schmidt served as an armed guard with the Nazi "Death's Head Battalion" at the Sachsenhausen concentration camp during World War II, he was ineligible to receive a visa. The court concluded that, because Schmidt's visa was invalid, he did not have lawful permission to enter the United States, and thus his subsequent naturalization was procured unlawfully under section 316(a)(1) of the Immigration and Naturalization Act. 8 U.S.C. § 1427(a)(1) (1982).[2] For the following reasons, we affirm.

I.

Michael Schmidt was born in Scharosch, Romania, of German parentage. In June, 1943, he was inducted into the German Army as a private and assigned to serve at

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[1] 18 U.S.C. § 1451(a) provides in pertinent part:

> (a) It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization *were illegally procured* or were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively. . . .

(Emphasis provided.)

[2] Section 316(a)(1) states in part that lawful admission to the United States is a prerequisite to naturalization.

the Sachsenhausen concentration camp near Oraneinburg, Germany. In the district court, the Government presented extensive evidence concerning the history of the Nazi regime and its plan to exterminate systematically individuals who disagreed with its policies, as well as groups it considered to be racially and socially inferior. The Nazis used concentration camps to carry out the Third Reich's plan to exterminate enemies or to exploit them through forced labor. The Gestapo, the Nazi secret police force, arrested and detained all persons thought to be enemies of the state. Those held in this manner could be incarcerated without trial for indefinite periods of time.

During Schmidt's service at Sachsenhausen, the camp was the second largest Nazi concentration camp after Auschwitz. Among those incarcerated there were Jews, Gypsies, Jehovah's Witnesses, certain Eastern European ethnics, political dissidents, homosexuals, and various individuals considered social "misfits," including beggars, vagrants, and the mentally ill. Each category of prisoner was forced to wear a colored triangle on the outside of its uniform: Jews, yellow; political prisoners, red; social misfits, black/brown; Jehovah's Witnesses, violet; homosexuals, pink. At the height of its operation, Sachsenhausen contained approximately 50,000 prisoners.

The "Death Head's Battalion"—the SS-Totenkopf Sturmbann—was organized as part of the armed SS[3] for the purpose of guarding Nazi concentration camps. The military command assigned Schmidt to guard prisoners on forced labor crews outside Sachsenhausen. His duties included escorting prisoners to and from work sites, counting prisoners before returning them to the concentration camp, and keeping prisoners in formation. Schmidt wore on his SS uniform the skull and crossbones insignia of the Death Head's Battalion. He carried a rifle and ammunition and had orders to shoot at prisoners who attempted to escape. Because concentration camp guards were not permitted

[3] *Die Schutzstaffel* ("SS") was the elite guard and intelligence unit of the Nazi Party.

to enter the camps themselves, Schmidt was confined to patrol outside the camp wall. Although there is no evidence that Schmidt personally killed prisoners, it has been documented that during the period he served at Sachsenhausen, two Jews were intentionally murdered and at least thirteen prisoners were executed by being shot through the nape of the neck.

In addition, tens of thousands died in Sachsenhausen as a result of starvation, exhaustion, beatings, exposure, disease, and medical experimentation. The grim history of Sachsenhausen has been well-documented by historians and tribunals that have tried Nazi war criminals. For example, the Government presented transcripts of German criminal proceedings against various individuals found guilty of committing atrocities at Sachsenhausen: camp leaders Hermann Sorge and August Hohn; barracks leader Wilhelm Karl Ferdinand; and medical doctors Heinz Baumkotter, Alois Gaberle, and Otto Adam. In addition, the Government presented the testimony of a historian, Charles W. Syndor, President of Emory and Henry College in Emory, Virginia, who has made a career of studying the Nazi regime and its concentration camps. Syndor's testimony catalogued the mass killings, subhuman living conditions, and bizarre medical experiments that occurred in Sachsenhausen and its environs. Finally, the Government submitted transcribed interrogations of Sachsenhausen guards and the testimony of camp survivors who witnessed beatings, killings, and indescribably cruel treatment of prisoners.

Schmidt continued to serve as an armed guard at Sachsenhausen until at least September, 1944. He then served in the Third Battalion of the 38th SS Armored Infantry Division, "Goetz von Berlichingen," and was wounded in combat in Lorraine, France on November 28, 1944. He remained in military hospitals until he became a British prisoner of war. He was released on July 8, 1946.

Schmidt made his way to the United States under the authority of the Displaced Persons Act of 1948 ("DPA").[4] Congress enacted the DPA to accommodate the large number of European refugees wishing to emigrate to the United States after World War II. A person seeking to obtain an immigration visa under the DPA was required to obtain a designation of "displaced person" status as defined by the Constitution of the International Refugee Organization of the United Nations ("IRO"). 62 Stat. 3037-55 (1946).[5] Annex I, Part II of the IRO Constitution provided that war criminals and others who "assisted the enemy in persecuting[6] civil populations of countries" were not "the concern" of the IRO. *Id.* at 3051-52. These individuals thus were excluded from the definition of "displaced persons" under the DPA.

After checking the applicant's background, a case analyst from the Displaced Persons Commission ("DPC") issued a report certifying that the applicant was a person eligible for admission into the United States. The analyst then forwarded the applicant's file to the appropriate American consulate. A vice-consul reviewed the visa application and other documents in the applicant's file, including the preliminary IRO certification and the DPC report. The vice-consul also interviewed the applicant and,

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[4] The amended version of the Act applied to individuals who, like Schmidt, entered the United States after its enactment.

[5] The IRO was founded in 1946 to provide services to the thousands of former prisoners of war and others dislocated by the war.

[6] As we indicated in *Schellong v. INS*, 805 F.2d 655, 660 (7th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987), a "substantial body of precedent" informs the definition of "persecution." The general standard is "the infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive (*e.g.*, race, religion, political opinion, etc.), in a manner condemned by civilized governments." *Id.* at 662 (citing H.R. Rep. No. 95-1452, 95th Cong., 2d Sess. at 5 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 4700, at 4704).

if the applicant met the criteria of the DPA and other immigration laws, the vice-consul issued a visa.

After living in Germany and Austria for several years following the war, Schmidt applied for a determination from the DPC that he was a displaced person eligible to emigrate to the United States. On his application, Schmidt indicated to the DPC that he was conscripted into the "German Army, Waffen-SS 'Goetz von Berlichingen,' " but he did not indicate his service as a guard at Sachsenhausen. Based on Schmidt's representations in his questionnaire, on February 28, 1952, DPC case analyst John F. Zipf, Jr. certified Schmidt as a displaced person eligible for a visa. Paul B. Lanius, Jr., the American Vice-Consul in Salzburg, Austria, issued Schmidt a visa in April, 1952. Schmidt entered the United States pursuant to this visa on May 24, 1952.

On March 1, 1968, Schmidt filed an application to become a United States citizen. Question 7 of the application form required him to list "present and past membership in every organization, association, fund, foundation, party, club, society, or similar group in the United States and in any other place, and your foreign military service." Schmidt entered his military service in the German army from 1943 to 1945, but did not indicate that he had served as an armed guard at Sachsenhausen from June, 1943 to September, 1944. On April 2, 1968, the United States District Court for the Northern District of Illinois issued a certificate of naturalization granting Schmidt United States citizenship.

Schmidt lived a quiet life in the Chicago area, where he worked as a janitor until his retirement. Following a determination by the Criminal Division of the Office of Special Investigations of the United States Department of Justice that there was good cause to revoke Schmidt's citizenship, the Government filed a complaint in federal district court on November 2, 1988. The court ordered

Schmidt's citizenship revoked[7] and, in February, 1990, Schmidt surrendered his certificate of naturalization to the Attorney General of the United States. This appeal followed.

II.

At issue is whether, under section 13 of the Displaced Persons Act, Schmidt's service in the SS as a guard at Sachsenhausen concentration camp rendered him ineligible to obtain a visa, in that his activities constituted assistance in the persecution of persons because of race, religion or national origin. The district court believed it did, and granted summary judgment on that basis. Summary judgment is appropriate in denaturalization proceedings when there are no genuine issues of triable fact. *United States v. Dercacz*, 530 F. Supp. 1348, 1350-51 (E.D.N.Y. 1982). We review the matter *de novo* to determine whether the record as a whole establishes that the Government was entitled to judgment as a matter of law.

Citizenship is procured illegally any time the applicant has failed to comply with "all the congressionally imposed prerequisites to the acquisition of citizenship." *Fedorenko v. United States*, 449 U.S. 490, 506 (1981) (citing *Afroyim v. Rusk*, 387 U.S. 253, 267 n.23 (1967)). Section 316(a)(1) of

[7] The district court entered summary judgment on Count I of the complaint, which alleged that Schmidt was not eligible for a visa under section 13 of the DPA because of his service as an armed guard at a concentration camp. Accordingly, the district court did not reach issues presented by the other counts of the complaint: whether Schmidt was a member of a movement hostile to the United States or to the form of government of the United States (Count II), whether he voluntarily bore arms against the United States (Count III), whether he acquiesced in activities or conduct contrary to civilization and decency on behalf of the Axis countries (Count IV), whether he willfully made misrepresentations in his visa application (Count V), whether he possessed the requisite good moral character to obtain a visa (Counts VI and VII), and whether he willfully concealed his membership in organizations on his naturalization petition (Count VIII).

the Immigration and Naturalization Act of 1952, 8 U.S.C. § 1427, requires that the person seeking naturalization has been "lawfully admitted for permanent residence," that is, possess a valid visa. In denaturalization proceedings for illegal acquisition of citizenship, an individual's failure to enter the United States lawfully by means of a valid immigration visa, a condition precedent to naturalization, commands denaturalization. Further, section 13 of the DPA mandates that an individual is ineligible for a visa if a member of a specifically excluded category of persons: those who assisted in persecution. *See, e.g., United States v. Leprich*, 666 F. Supp. 967, 969 (E.D. Mich. 1987) ("[B]ecause Leprich was a concentration camp guard, he was ineligible for the visa he received and his citizenship was illegally procured.")

The district court granted summary judgment in favor of the Government on the ground that Schmidt had "in fact assisted in the persecution of persons because of their race, religion or national origin by serving as an armed guard at Sachsenhausen concentration camp." *United States v. Schmidt*, No. 88-C-9475, slip op. at 21 (N.D. Ill. January 3, 1990). Schmidt argues that the district court erred in several respects. The essence of his argument is that the court improperly focused upon his *status* as a member of the "Death Head's Battalion," rather than upon his *specific* conduct.

Schmidt first maintains that the court failed to consider that he involuntarily joined the SS. In *Fedorenko*, the Supreme Court stated that "[u]nder traditional principles of statutory construction, the deliberate omission of the word 'voluntary' from the DPA compels the conclusion that the statute made *all* who assisted in the persecution of civilians ineligible for visas." 449 U.S. at 512 (emphasis in original). The Court rejected the distinction between voluntary and involuntary service for DPA purposes, and held that service as an armed guard in a concentration camp constitutes assistance to the enemy under the DPA as a matter of law. *Id.* at 514. Therefore, Schmidt's involuntary service argument is meritless.

Schmidt also argues that he personally did not commit atrocities against the Sachsenhausen prisoners. He contends that because armed guards were not permitted to enter the camp, he had no knowledge of the persecution occurring within Sachsenhausen's walls. Whether or not Schmidt personally engaged in acts of violence, however, does not affect our conclusion that he assisted in persecution.[8] Concerned that concentration camp survivors might become ineligible for visas because of "assistance" they had provided to their Nazi captors in the death camps, the *Fedorenko* Court drew a continuum of conduct ranging from passive acceptance to active, personal participation. The Court distinguished between a person who only cut the hair of fellow inmates before they were killed and an armed guard who shot a fleeing inmate, finding that the former should not be found to have assisted in the persecution of civilians, but that the latter should. *Id.* at 512 n.34. It is more difficult to determine whether conduct falling elsewhere on the continuum may be considered persecution. The difficulty of the problem is magnified by the task of determining the contribution of a single individual to the collective wrongdoing of a nation or group.

Whatever close questions may be presented by the application of the *Fedorenko* continuum to other factual situations, it is clear that service as an armed concentration camp guard constitutes assisting in persecution under the DPA. In *Schellong v. INS*, 805 F.2d 655 (7th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987), we observed that

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[8] We note that although Schmidt's actual knowledge of the events occurring inside the walls of Sachsenhausen is unnecessary to a conclusion that he assisted in persecuting its inhabitants, his assertion that he was ignorant of the persecution is belied by the fact that he guarded concentration camp prisoners who wore color-coded patches to signify their racial, ethnic, social or political status. Further, Schmidt's primary job was to escort prisoners to and from forced labor sites. Some collapsed at work, and many later died from the combined effects of starvation and exhaustion.

"Nazi concentration camps were places of persecution; individuals who, armed with guns, held the prisoners captive and prodded them into forced labor with threats of death or capital punishment cannot deny that they aided the Nazis in their program of racial, political, and religious oppression." *Id.* at 661. When examined in context, the activities of an armed concentration guard must be viewed as contributing to the collective effort of the Nazis to persecute innocent civilians.

Indeed, the facts in Schmidt's case virtually are indistinguishable from those in *Kulle v. INS*, 825 F.2d 1188 (7th Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988). Kulle also served in the Totenkopf Division of the Nazi Waffen SS. From 1942 to 1945, he was an armed guard at Gross-Rosen, a concentration camp in Silesia, now a part of Poland. Gross-Rosen was a forced labor camp, and Kulle, like Schmidt, worked along the perimeter of the camp. Kulle, like Schmidt, argued that he did not assist in persecuting prisoners "merely because he was present." *Id.* at 1192. Rejecting this argument, we indicated that, because the applicable statutory provision authorized deportation of anyone who "assisted" in persecution, "personal involvement in atrocities need not be proven." *Id.* Thus, we affirmed an order of Board of Immigration Appeals that Kulle be deported because he participated in persecution. Schmidt argues that *Kulle* is distinguishable because Kulle participated in the forced removal of concentration camp prisoners from Poland to Germany in mid-winter, while Schmidt guarded work parties. The distinction eludes us. Service as an armed guard equally ensured the systematic destruction of concentration camp inmates. *See also United States v. Kairys*, 782 F.2d 1374, 1378 (7th Cir. 1986) ("*Fedorenko* continues to stand for the proposition that service as an armed guard equals persecution.")

Thus, even if Schmidt personally did not participate in the brutal acts committed at Sachsenhausen, the fact of his armed, uniformed service is sufficient to establish that

he assisted in persecution.[9] In *United States v. Osidach*, 513 F. Supp. 51, 78-79 (E.D. Pa. 1981), *appeal dismissed on defendant's death*, No. 81-1956 (3rd Cir. 1981), the court concluded that an individual who served as an armed, uniformed member of the Ukrainian police during World War II was a participant in persecution for purposes of section 13 of the DPA. The *Osidach* court suggests, as does Schmidt, that mere membership in a group involved in persecution is insufficient to establish that an individual is a persecutor himself. *Id.* at 79. Even the *Osidach* court recognized, however, that armed, uniformed service on behalf of an occupying force constitutes a form of persecution:

> The mere presence of the watchful eye of the conqueror or his deputies, coupled with the often demonstrated presence of both the means and the inclination to persistently inflict various indignities, physical abuse, injuries or even death, without notice or reason, is the personification of mental persecution, to anyone, let alone innocent civilian men, women and children reduced to various degrees of substandard mental and physical well-being.

Id. at 99.

In light of these precedents, we conclude that Schmidt assisted in persecution of persons because of race, religion or national origin as contemplated by section 13 of the

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[9] Schmidt argues that summary judgment was inappropriate because intent to persecute was at issue. This argument misses the mark entirely, as, in cases of this type, intent is irrelevant. In *Dercacz*, 530 F. Supp. at 1351, the trial court granted summary judgment to the Government in a denaturalization proceeding involving a former Ukrainian police officer whose duties included bringing Jews to the local police station and reporting civilians who had sold food to Jews. The Nazis used the Ukrainian police to keep order in occupied territories. The court held that clear and convincing evidence of Dercacz's service in the Ukrainian police force left "no doubt" that he assisted the Nazis in persecuting Jews. Here, the uncontroverted fact of Schmidt's service as an armed guard at Sachsenhausen is clear and convincing evidence that he assisted the Nazis in persecuting civilians.

DPA. He carried a gun and wore the uniform of the dreaded "Death Head's Battalion". He guarded Jews, Gypsies, Jehovah's Witnesses, Eastern European nationals, and other persecuted peoples and forced them to do the bidding of the Third Reich. Schmidt prevented these prisoners from fleeing, and subjected them to forced labor under unspeakably brutal conditions. Such employment removed Schmidt from the intended scope of those to be aided by the DPA.

III.

In affirming the district court's revocation of Schmidt's citizenship, we are mindful of the fact that Schmidt has lived in the United States for many years, and that he has raised a family and established roots in this country. At the same time, we are mindful of the fact that Schmidt entered the United States on an invalid visa and acquired that "precious right" of citizenship unlawfully. When Congress enacted the DPA, it sought to help those who had been persecuted by the enemy because of their religious, nationalistic, and ethnic identities. By excluding those who "assisted in persecution" in section 13 of the DPA, Congress intended to prevent those who contributed to the Nazi persecution of innocent civilians from obtaining visas to enter the United States as refugees. It would defeat the paramount purpose of the DPA—to assist those whose lives had been disrupted by persecution—to extend the statute's benefits to the persecutors themselves.

As we held in *Kulle* and the Supreme Court held in *Fedorenko*, an armed guard at a Nazi concentration camp is not eligible for a visa under the Displaced Persons Act. Schmidt, therefore, was not eligible for the visa he obtained pursuant to the DPA. Because he did not fulfill all of the statutory requirements for naturalization, his citizenship was illegally procured. Accordingly, the district court's entry of summary judgment revoking his citizenship and canceling his certificate of naturalization was correct as a matter of law and is, therefore,

AFFIRMED.

PELL, *Senior Circuit Judge*, dissenting. This case involves the cancellation of what the majority correctly terms the "precious right" of citizenship. Because I do not believe the resolution of that issue in this case by summary judgment was appropriate, I respectfully dissent.

There is substantial reference in the record of this case to the depths of depravity to which the Third Reich descended. No one disputes that now. The question before this court, however, in a sense, is the extent, if any, that Schmidt was smeared by the evil brush of the governmental activities inside Sachsenhausen.

The record is, of course, sparse because this case is here without a trial. But there is no evidence that this defendant participated in any wrongful act toward any prisoner; there is affirmative evidence that he was never inside Sachsenhausen prison camp; there is affirmative evidence that he was a work-party guard and that he obeyed the regulation which forbade mistreatment of prisoners on work parties; and there is affirmative evidence that his service to the Third Reich of Germany, not his native country, in World War II was hardly "voluntary." It was, accepting all of this, the district court's judgment that a violation was shown solely on the basis of participation as a guard outside the walls of the camp.

It may well be that summary judgment can be appropriate in a denaturalization case involving a claimed defective entry visa under the Displaced Persons Act. The majority opinion so states when there are no genuine issues of triable fact, citing *United States v. Dercacz*, 530 F. Supp. 1348, 1350-51 (E.D.N.Y. 1982). In that case, however, Dercacz testified himself to the effect that he had assisted in persecution.

In the case before us, the only straw that would appear to seem to suggest Schmidt had some idea that some of the work prisoners were persecuted because of beliefs would be found in that he knew from their triangles that they were homosexuals. But, as his counsel pointed out, homosexuals were jailed in some of the states of this country at that very period of time.

The district court in its ruling found it did not make any difference whether Schmidt had knowledge or not. I disagree. As a matter of what was involved in the Displaced Persons Act, I cannot conceive how a person can be rendering assistance in persecution without some showable knowledge, or at the very least evidence of facts known to him which could lead only to a conclusion that the work prisoners were being persecuted. Schmidt, in my opinion, as a citizen was entitled to a trial on the issue of knowledge.

Cases interpreting *Fedorenko v. United States*, 449 U.S. 490 (1981), hold (while finding) that "in order to establish 'participation' or 'assistance' the act of participation must involve some personal activity involving persecution." *United States v. Osidach*, 513 F. Supp. 51, 72 (E.D.Pa. 1981). The Ninth Circuit reads "assist" in these words:

> personal active assistance or participation in persecutorial acts. . . ." (*Laipenieks v. INS*, 750 F.2d 1427, 1432 (9th Cir. 1985).

Fedorenko does not hold otherwise; in both examples given (the barber and the guard who shoots) knowledge is presumed, unlike the present case in which there is no factual basis supporting knowledge. The court's holding was based simply on the fact that the haircutting did not rise to the level of "assistance in persecution." *Fedorenko* is not a case holding that "knowledge" is not an element of "assistance." *Fedorenko v. United States*, 449 U.S. at 512, note 34. *Kungys v. United States*, 485 U.S. 759, 767 (1988).

It is true that this concept of "assistance" is not "capable of a precise definition" (*United States v. Sprogis*, 763 F.2d 115, 121 (2d Cir. 1985)), but it is also true that the "facts and the law should be construed as far as is reasonably possible in favor of the citizen. . . ." *Schneiderman v. United States*, 320 U.S. 118, 122 (1943).

The Government relied on *Kulle v. INS*, 825 F.2d 1188 (7th Cir. 1987) as holding that there is no requirement of "knowledge" for "assisting."

Sergeant Kulle was deported on a record that included this question and answer (825 F.2d at 1195):

> Q. Okay, was it your understanding at the time you made these lies, that if you had told the truth about your SS service you would have been denied admission to the United States?
>
> A. That's correct.

Kulle had denied SS service. Schmidt put it on his application. Kulle was decorated with the Iron Cross (825 F.2d at 1190); Schmidt's service record shows nothing except that he came and went as a private, with no decorations. Kulle was a training leader, Schmidt was not. Kulle participated in a forced evacuation from a camp in the East to Mauthausen. Schmidt did not. The Court distinguished a "deportation" case from a denaturalization case (such as Schmidt's) (825 F.2d at 1193), and, with Kulle's admitted lies, ordered him deported.

As in *Schellong v. INS*, 805 F.2d 655 (7th Cir. 1986), this court held that *Kulle* (on a trial record) had enough knowledge to be found to have assisted in persecution. In the present case, the facts in the record developed thus far did not reach the point of establishing knowledge on the part of Schmidt. In *Kulle*, a judgment was made on the basis of an INS record after a hearing at which Kulle's attorney was granted cross examination. Schmidt is to lose his citizenship without a fact hearing.

It may be at a trial, the trier of fact, evaluating the credibility of witnesses, might conclude that it is incredible that Schmidt during the relatively short period he was an outside guard could not help being aware that he was assisting in persecution. But that is a matter of credibility. Schmidt did not have such a chance. One might now think it is incredible that a presumably intelligent airline pilot could believe in good faith that the Internal Revenue Act is unconstitutional. *Cheek v. United States*, 59 U.S.L.W. 4049 (Jan. 8, 1991). He, however, was entitled to a fair trial and so should Schmidt be. Our system

of justice that guilt should not be predicated on anything less than a fair trial is too important to tolerate any deviation or diminution.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT—WITH ORAL ARGUMENT

Date: January 30, 1991

BEFORE:
Honorable William J. Bauer, Chief Judge
Honorable Harlington Wood, Jr., Circuit Judge
Honorable Wilbur F. Pell, Jr., Senior Circuit Judge

No. 90-1070

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MICHAEL SCHMIDT,

Defendant-Appellant

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 88 C 9475, Judge Paul E. Plunkett

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 4, 1991.

Before

Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Senior Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 90-1070 vs.

MICHAEL SCHMIDT,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 9475—Paul E. Plunkett, *Judge.*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed in the above-entitled matter by Defendant-Appellant Michael Schmidt, no judge in active service has requested a vote thereon, and a

majority* of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is, DENIED.

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* The Honorable Wilbur F. Pell, Senior Circuit Judge, voted to grant a rehearing.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

UNITED STATES OF AMERICA

v. Case Number: 88 C 9475

MICHAEL SCHMIDT

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that summary judgment is granted to the United States on Count I. Defendant's citizenship is revoked, his Certificate of Naturalization is cancelled, and defendant Michael Schmidt is ordered to surrender and deliver the Certificate of Naturalization to the Attorney General.

Date January 3, 1990

H. STUART CUNNINGHAM
Clerk

/s/ Theresa B. Kinney
(By) Deputy Clerk

APPENDIX E

[DATED JANUARY 3, 1990]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	No. 88 C 9475
v.	)	
	)	Hon.
MICHAEL SCHMIDT,	)	Paul E. Plunkett
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

In 1952, Defendant, Michael Schmidt, was granted a visa to immigrate to the United States from Austria under the Displaced Persons Act (DPA). In 1968, after residing in the United States for almost sixteen years, Michael Schmidt applied for and was granted United States citizenship. The United States now seeks to revoke Schmidt's certificate of naturalization and denaturalize him because during World War II he served as a guard at Sachsenhausen concentration camp and because he failed to reveal this fact in applying for his visa and for citizenship.

The United States has moved for summary judgment on several counts of the amended complaint. Judgment for the government on any count will result in Schmidt's denaturalization. Count I seeks denaturalization on the ground that Defendant was not eligible for a visa under

the DPA because of his service as an armed guard at a concentration camp. The DPA prohibits the issuance of visas under the DPA to persons who assisted in the persecution of any person because of race, religion, or national origin. DPA § 13. One who is ineligible for a visa cannot be lawfully admitted into the United States and therefore cannot be lawfully naturalized under 8 U.S.C. § 1427(a)(1). Count II alleges Schmidt did not lawfully become a citizen because his visa was unlawfully procured under DPA § 13, which prohibits issuance of a visa to one who is or has been a member of a movement hostile to the United States or to the form of government of the United States. The government argues that Schmidt's membership in the SS Totenkopf Sturmbanne (SS Death's Head battalion) as a concentration camp guard constituted membership in a movement hostile to the United States. Count III alleges that Defendant voluntarily joined the Waffen-SS, making him ineligible for a visa under DPA § 13, which provides that no visas shall be issued to persons voluntarily bearing arms against the United States in World War II. Count IV seeks denaturalization because Defendant's service as an armed concentration camp guard constitutes acquiescence in activities or conduct contrary to civilization and human decency on behalf of the Axis countries. State Department regulation 22 C.F.R. §§ 53.32-53.33 forbids the issuance of a visa to any alien acquiescing in such activities or conduct. Count V alleges that Schmidt unlawfully procured his citizenship by willfully misrepresenting that he had not participated in any movement hostile to the United States for the purpose of gaining admission to the United States, in violation of DPA § 10. Count VI alleges illegal procurement of citizenship under 8 U.S.C. § 1427(a)(3), which requires that a person may not be naturalized unless he has been a person of good moral character. The government alleges that Schmidt

is not of good moral character as evidenced by his activities in the SS. Count VII seeks denaturalization for lack of good moral character, alleging Defendant gave false testimony to obtain admittance and citizenship. Count VIII seeks revocation of citizenship on the ground that Schmidt willfully concealed his membership in organizations on his naturalization petition. All eight counts seek the same relief: a declaration that Schmidt illegally procured his citizenship; revocation of his citizenship; cancellation of his Certificate of Naturalization; judgment restraining Schmidt from claiming any rights of United States citizenship; and the surrender of Schmidt's Certificate of Naturalization.

The government seeks summary judgment on Counts I, IV, V, and VI. We grant summary judgment on Count I and revoke Schmidt's citizenship, because the evidence is undisputed that Schmidt served in the SS as a guard at Sachsenhausen concentration camp and that, under the DPA, this service rendered him ineligible for a visa. We find that the law is clear that under these circumstances, Schmidt was not entitled to a visa under the DPA, and his activities constituted acquiescence and assistance in the persecution of persons because of race, religion or national origin. We do not reach the issue of whether there is a genuine dispute as to any material facts with respect to whether Schmidt willfully made misrepresentations as alleged in Counts V and VI, nor do we rule on whether Schmidt's actions constitute acquiescence in activities or conduct contrary to civilization and human decency, as these are not necessary to our ruling that Schmidt unlawfully procured his citizenship. We enter final judgment in favor of the government, granting all the relief requested, and note that we believe that this order is final and appealable.

Facts

Although Schmidt does not at this time dispute that he served as a prison guard as Sachsenhausen concentration camp and was a member of the SS Death's Head battalion for approximately one year between summer, 1943 and fall, 1944, we discuss at length the evidence presented by the government. This evidence shows that the Michael Schmidt who is a defendant in the action before us is the same Michael Schmidt referred to in these documents: he was born in the same place and on the same date as described therein, to a father named Johann, and he suffered an injury to his left arm in battle. The government's evidence also shows that Sachsenhausen was a concentration camp at which prisoners were routinely mistreated; they were starved, overworked, beaten, experimented upon and killed.

Defendant does not directly dispute any of the evidence presented below, nor does he present any evidence of his own to contradict it. He argues that there are factual disputes as to whether he assisted in persecuting anyone because of race, religion or national origin, since he was unaware of why prisoners were incarcerated at Sachsenhausen. He notes that there is evidence that criminals and some SS guards were housed at Sachsenhausen and that it was not an extermination camp. He further argues that the evidence shows that he never harmed anyone and never fired his weapon and that he saw no one else harm a prisoner. Therefore, he argues that it is a disputed fact whether he assisted or acquiesced in the persecution of any person because of race, religion, or national origin. He also alleges that there is a dispute as to whether he ever made any material misrepresentations on his visa application, noting he revealed his service in the SS. He argues that there are disputes as to whether there were misrepresen-

tations, whether the alleged misrepresentations were material, and whether the government actually knew of his concentration camp service. Schmidt further argues that the government should be prevented from prosecuting this action against him by laches and estoppel.

1. *Evidence Concerning Schmidt*

Exhibit 1.1 contains a translation of medical records from the Reserve Military Hospital in Bergen-Schwarmstedt for Michael Schmidt, born March 4, 1923 in Romania, whose father was Johann Schmidt. Michael Schmidt entered German military service on June 23, 1943 and served in the SS Death's Head Battalion in Oranienberg. These records indicate the subject has an arm wound on either his right or left side from a bullet and grenade splinter.

Exhibit 1.2 is a Concentration Camp Service Card for Michael Schmidt. It states that he was inducted on June 23, 1943 into the Waffen SS as a private and served at the concentration camp in Sachsenhausen in the SS Death's Head Guard Battalion until September 19, 1944, when he was transferred to combat.

Schmidt stated in his deposition that he was born on March 4, 1983 [sic], in Romania and his father's name was Johann. Exhibit 1.3 at 8-9. When asked about his health throughout his life he indicated an injury from the war on his left upper arm. *Id.* at 19-20, 179. He admitted serving in the SS. *Id.* at 27. He said that a friend signed him up for the Waffen SS at some rally. *Id.* at 35, 38-40. He was drafted into German military duty and inducted on June 20, 1943. *Id.* at 35. He initially was called by the Romanian army, but believes there was an agreement with the German government and the German Army took over. *Id.* at 44, 47.

The government disputes this claim and has presented evidence that Defendant's enlistment was voluntary. The agreement between Germany and Romania concerning military service, signed 12 May 1943, allowed ethnic Germans who were Romanian citizens to volunteer for service in the Waffen-SS instead of being drafted into the Romanian military forces. The agreement provided that to do so, ethnic German Romanian citizens had to sign a form stating that their enlistment in the German forces was voluntary. Exhibit 3.31; Exhibit 9.4 at 43-44.

Schmidt further testified that he wore a Waffen SS uniform, with a Totenkopf Death's Head symbol and was first assigned to Oranienberg. *Id.* at 42, 66. He was tattooed after a few months and assigned to barracks in Oranienberg in Sachsenhausen, just across the street from the concentration camp. *Id.* at 54, 82. He spent some time being trained and then was gradually assigned the duties of a guard. *Id.* at 72-73.

As a guard, he took prisoners from the camp to work outside the camp, guarded them as they worked and brought them back at night, carrying a rifle and wearing a uniform. *Id.* at 74-76, 120-121. His orders were to holler at any prisoner trying to escape, to fire a warning shot and then to shoot him. *Id.* at 122-123. A few times he also guarded around the camp, outside the main wall, to prevent prisoners from escaping over the wall. *Id.* at 84. He received pay and could leave the barracks at certain times. *Id.* at 77. He never fired his weapon other than at training. *Id.* at 79.

Schmidt testified that he was aware that there were gay prisoners at the camp and that they wore triangles, which he believed were purple. *Id.* at 153. He claimed his unit at the camp was Waffen SS, Goetz von Berlichingen. *Id.* at 159. He never heard during the war about

the Totenkopf unit and was not aware that he was a member of it. *Id.* at 209. He denied receiving any training in Nazi political ideas, and stated that they were told nothing about the prisoners or why they were at the camp, and were forbidden to talk with them. *Id.* at 164.

Schmidt testified that when he applied to come to the United States, he told the authorities that he was in the SS, but they did not ask him whether he had worked as a guard at a concentration camp and so he did not tell them that he had. *Id.* at 199-200. He never told anyone that he was a guard at Sachsenhausen concentration camp. *Id.* at 204. He said that no one asked him that and there was no form requesting that information. *Id.* at 208. He never told any United States official that he was not a guard at a concentration camp. *Id.* at 217. An affidavit he signed for immigration purposes stated, "I have never advocated or assisted in the persecution of any person because of race, religion or national origin." When asked whether, by serving as a guard at a concentration camp, he had assisted in persecution, he responded, "Not I know. I was put to stand guard. I don't had nothing to do with nobody. I was put there not by choice." *Id.* at 220.

2. *Evidence Concerning Sachsenhausen*

The government has presented substantial evidence showing that atrocities were committed at Sachsenhausen. First, they present the transcripts of the State Court of Bonn's judgment in the criminal proceedings against Hermann Sorge, a camp leader, and Wilhelm Karl Ferdinand, a barracks leader, at Sachsenhausen, *see* Exhibit 2.1; the State Court of Dusseldorf's judgment in criminal proceedings against August Hohn, a camp leader at Sachsenhausen, *see* Exhibit 2.2; and the State Court of Munster's

judgment in the criminal proceedings against Dr. Heinz Baumkotter, chief medical doctor of Sachsenhausen from 1943-1945, and Dr. Alois Gaberle and Dr. Otto Adam. *See* Exhibit 2.3. In addition, there are two exhibits presenting interrogation testimony of guards at Sachsenhausen. Exhibit 4.1 contains a transcribed interrogation of Gustav Wegner, commander of the guard battalion of the Death's Head ("Totenkopf") SS Division in the Sachsenhausen concentration camp from 1941 until August, 1944. Exhibit 4.2 contains the transcribed interrogation of Leopold Schweitzer, a Sachsenhausen guard.

The government also presents, as Exhibit 9.4, the testimony of Charles W. Syndor, President of Emory and Henry College in Emory, Virginia, whose doctoral dissertation in history is entitled, "Totenkopf: A History of the SS Death's Head Division." Dr. Syndor states that his professional career has been spent studying and teaching German history, particularly during the Nazi period. Exhibit 9.4 at 1-2. He has written a book on the Death's Head Division and has been qualified as an expert witness in the field of German history, particularly with respect to the Nazis and the concentration camps, by four courts, including the Northern District of Illinois (*United States v. Schellong*, 547 F. Supp. 569 (N.D. Ill. 1982)). Exhibit 9.4 at 2-4. These exhibits contain extensive discussions of the circumstances at Sachsenhausen concentration camp.

With respect to the Sachsenhausen concentration camp, Dr. Syndor states that beginning in 1936, the SS concentration camp guards received the designation "SS Totenkopfverbande," which means SS Death's Head Formations. Exhibit 9.4 at 14. Various Death's Head battalions served at Sachsenhausen, sometimes under slightly different designations, performing the same duties and assign-

ments. Exhibit 9.4 at 35. The camp was guarded by about 2000 SS soldiers. Exhibit 4.1 at 6. The duties were the guarding of the camp, escorting prisoners to and from work and guarding them at the worksite, and escorting transports of prisoners. Exhibit 9.4 at 36. Guards had standing orders to shoot to kill immediately upon any attempt by a prisoner to escape. Exhibit 4.1 at 7; Exhibit 9.4 at 36. At the worksite, guards were to shoot, after one warning, any prisoner who crossed the boundary of the sentry chain. Exhibit 9.4 at 39.

The camp, which was severely overcrowded, housed, among others, Jehovah's Witnesses, homosexuals and Jews. Exhibit 2.1 at 36; Exhibit 4.1 at 3. These persons were subjected to particularly brutal treatment and most of the Jehovah's Witnesses and homosexuals there perished. Exhibit 9.4 at 47. Starting in 1938, asocials were transported to the camp, including beggars, hobos, Gypsies, work shirkers and petty criminals. Exhibit 2.1 at 57; Exhibit 9.4 at 47. Beginning in 1941, parts of the camp housed large numbers of Soviet prisoners of war. Exhibit 2.1 at 37; Exhibit 9.4 at 46. Most of the Jews from Sachsenhausen were transferred to Auschwitz in October 1942. Exhibit 2.1 at 56. However, some remained during the period when Defendant worked there as a guard. Exhibit 9.4 at 49. Two Jews were killed at the camp while defendant was there in May 1944. Exhibit 9.4 at 49. Many aliens, including Czechs, Poles and Belgians, were sent to the camp. Exhibit 2.1 at 59-60; Exhibit 4.1 at 3. Also incarcerated there were SS and SA members who displayed behavior harmful to the party or who had committed crimes. Exhibit 2.3 at 30, 86.

Prisoners wore colored triangular patches assigning them to various categories: red for political prisoners, yellow for Jews, pink for homosexuals, violet for Jehovah's

Witnesses, etc. Exhibit 2.1 at 60; Exhibit 2.2 at 14; Exhibit 9.4 at 48. Prisoners were widely mistreated. "Upon being brought in, the prisoners as a rule were given 25 blows with the cane." Exhibit 2.1 at 36. They were repeatedly mistreated from the time they arrived at the camp, by beating, kicking, and other forms of physical abuse. Exhibit 2.1 at 62, 70; Exhibit 4.2 at 2-3; Exhibit 9.6 at 4. Whipping was a commonly used form of punishment. Exhibit 9.4 at 51. Prisoners were made to perform very heavy labor and were poorly fed. Exhibit 9.4 at 53.

Tens of thousands died at Sachsenhausen. Exhibit 9.4 at 53. The death rate among new arrivals at the camp was particularly high. Exhibit 2.1 at 64. Many collapsed at work or at roll calls. Exhibit 2.1 at 67-68. Punishments for misbehavior were brutal and often resulted in death. Exhibit 2.1 at 78-82. Several prisoners were hanged in front of the assembled prisoner population. Exhibit 2.2 at 18-41. One prisoner was hanged for cutting leather strips from an old bag and nailing them under the soles of his wooden clogs to facilitate walking in the snow. Exhibit 2.2 at 35-36; Exhibit 9.4 at 57. Others were shot by guards. Exhibit 4.1 at 8-9. Further, many prisoners were subjected to medical experimentation. Exhibit 2.3 at 11-12, 58, 60-64, 102-103; Exhibit 9.4 at 54-55. Eventually, mass killings took place at the camp. In 1942, a crematorium was built at the camp. Exhibit 2.2 at 46; Exhibit 9.4 at 30. By 1943, Sachsenhausen was the second largest concentration camp, after Auschwitz. Exhibit 9.4 at 46.

From late fall 1943 to early 1945 many groups were transferred to Sachsenhausen to be killed. Certain groups were delivered to the camp solely for "purposes of liquidation." Exhibit 2.1 at 74; Exhibit 2.2 at 49-50. These groups included Jews, Czechs, and Poles. Exhibit 2.1 at 74-75. Some were brought directly to the crematorium building and executed using a variety of techniques in-

cluding gas administered in shower facilities, and shooting through the nape of the neck. Exhibit 2.2 at 50-65; Exhibit 9.4 at 56, 59. At least thirteen people were executed in the nape-shot facility during the period when Defendant was a guard at Sachsenhausen. Exhibit 9.4 at 59. Others were housed in extremely overcrowded facilities and subjected to complete physical destruction by being forced to keep in constant motion while being beaten and kicked. Some were forced to run in the snow naked, or asphyxiated in air-tight locked broom closets crowded with other prisoners. Exhibit 2.1 at 75-76.

Finally, the government presented the testimony of three survivors of Sachsenhausen. Joseph Oppenheimer was incarcerated at Sachsenhausen from August 1944 until the end of the war. Exhibit 9.6 (Affidavit of Joseph Oppenheimer) at 2. He and other prisoners were put to work defusing unexploded bombs. SS guards watched them from several blocks away, safe from any explosions. Several prisoners were killed when some of the bombs detonated. Exhibit 9.6 at 2. He stated that prisoners died of starvation on a daily basis at the camp. Exhibit 9.6 at 3.

Hans Walter was also imprisoned at Sachsenhausen, beginning in January, 1944. Exhibit 9.7 (Affidavit of Hans Walter) at 1. He lived in unheated barracks. Exhibit 9.7 at 2. He saw inmates whipped for speaking in Hebrew or for saluting guards incorrectly. Exhibit 9.7 at 2. He also saw several prisoners beaten to death. Exhibit 9.7 at 2-3.

Leon Messer was incarcerated at Sachsenhausen beginning around December 1942. He observed that most of the prisoners were starving. Exhibit 9.8 (Affidavit of Leon Messer) at 3. He witnessed many prisoner deaths, including several by hanging. Prisoners were regularly beaten. Exhibit 9.8 at 4.

3. Evidence Concerning Schmidt's Immigration

The government presented numerous pieces of evidence showing that if Schmidt's service as a guard had been known, he would not have been permitted to immigrate to the United States. The report of investigation of the displaced persons screening project contains Schmidt's statement that his military service consisted of service in the SS Panzer Inf. Div., Goetz v. Berlichingen, as a private. Exhibit 6.4 at 6, 40. It also contains a notation of May 17, 1951, that a Martin Braun stated during interrogation that one Michael Schmidt, SS Rottenfuehrer, is listed as a guard on a death march from Vienna to Mauthausen. Exhibit 6.4 at 37. This notation, according to the government, refers to a Michael Schmidt other than the Defendant herein. The government states that Defendant does not dispute that a different Michael Schmidt is referred to in Exhibit 6.4. Government's Reply Brief at 16-17.

John Zipf states that he was a case analyst for the Displaced Persons Commission ("DPC") and served in that capacity in Linz, Austria, from February to June, 1952. Exhibit 9.2 at 1. He reviewed displaced persons applications to determine their eligibility, including Michael Schmidt's. Exhibit 9.2 at 1, 3. He states,

> If, during the course of reviewing an application under the amended DP Act [Displaced Persons Act], I had learned that the applicant had served as an armed guard at a Nazi concentration camp during World War II, I would have recommended rejection of the application. One reason for the rejection would have been Section 13 of the amended DP Act. One exclusionary clause in Section 13 required rejection of an applicant who assisted in the persecution of any person because of race, religion or national origin. It would not have affected my determination to recommend rejection of an application for a visa under the

> DP Act if I had determined that the applicant involuntarily served as a guard at a Nazi concentration camp or that the applicant did not directly inflict any injury or killed any person confined at the Nazi camp.
>
> If the applicant stated on his application that in 1943 he was conscripted into the "German Army, Waffen SS, Goetz von Berlichingen" serving until 1944 at which time he was wounded and hospitalized until 1945 and it was later learned that he had, in fact, served as an armed SS guard at the Sachsenhausen Concentration Camp in Germany between 1943 and September, 1944, his application would have been rejected under Section 10 of the amended DP Act because of his misrepresentation. Section 10 excluded applicants who willfully made misrepresentations for the purpose of gaining admission into the United States.

Exhibit 9.2 at 2-3.

Paul Lanius, who was a United States Vice Consul at Salzburg, Austria from May 1951 to May 1952 with responsibility for determining the eligibility of persons for visas under the DP Act, stated under oath in his affidavit that he received the DPC reports on applicants for such visas and interviewed the applicants. He would go over all the information in an application and require the applicant to swear to the truth of the information and sign the application. Exhibit 9.3 at 1-3. He signed Michael Schmidt's visa application. Exhibit 9.3 at 4. He states

> If, in the course of reviewing Schmidt's application for a United States visa, in 1952, I had learned he had served as a guard at a Nazi concentration camp during World War II, I would have rejected his application. One reason for the rejection would have been Section 13 of the amended DP Act. One exclusionary clause in Section 13 required rejection of an applicant who assisted in the persecution of any person because of race, religion or national origin. It

> would not have affected my determination to reject an application for a visa under the DP Act if I had determined that the applicant involuntarily served as a guard at a Nazi concentration camp or that the applicant did not directly inflict any injury or killed any prisoner confined at a Nazi concentration camp.
>
> If the applicant stated in his application that during the period between 1943 and 1945 he had resided in the German Army and it was later learned that he had resided at the Sachsenhausēn Concentration Camp as a member of a guard unit between June 1943 and September 1944, his application would have been rejected under Section 10 of the DP Act because of his misrepresentation. Section 10 excluded applicants who willfully made misrepresentations for the purpose of gaining admission into the United States.

Exhibit 9.3 at 4-5.

Lee Reinfeld states that he is an employee of the United States Immigration and Naturalization Service (INS) and has so been since 1962. Exhibit 9.5 at 1. His job is to examine applicants for citizenship and recommend whether or not they should be admitted. Exhibit 9.5 at 2. He examined Michael Schmidt's Petition for Naturalization and signed it. Exhibit 9.5 at 5. He states that an applicant who served as an armed SS guard at a Nazi concentration camp could not have been lawfully admitted to the U.S. under the DP Act and would be ineligible for citizenship. Exhibit 9.5 at 5.

Analysis

Count I

The government carries a heavy burden of proof in a denaturalization case. The evidence justifying revocation of citizenship must be clear, unequivocal, and convincing.

Fedorenko v. United States, 449 U.S. 490, 505 (1981). However, summary judgment may be granted in a denaturalization proceeding where no genuine triable issues of fact exist. *See United States v. Dercacz*, 530 F Supp. 1348, 1351 (E.D.N.Y. 1982).

In *Federenko*, the Supreme Court interpreted the relevant provisions of the DPA and held, "The plain language of the [Displaced Persons] Act mandates . . . [that] an individual's service as a concentration camp armed guard—whether voluntary or involuntary—made him ineligible for a visa." 449 U.S. at 512. In *Federenko*, the defendant had gained a visa under the DPA by concealing the fact that he had served as an armed guard at the Nazi concentration camp at Treblinka. As in Schmidt's case, there was testimony by government witnesses that petitioner would have been denied a visa if the government had known he was an armed camp guard, regardless of whether he served voluntarily and regardless of whether he personally committed any atrocities against inmates. *Federenko*, 449 U.S. at 499-500.

Federenko served as a guard at Treblinka, which, unlike Sachsenhausen, was a death camp where people were brought solely to be killed. We do not find this distinction relevant, however, since it is clear from the evidence above that numerous atrocities were committed at Sachsenhausen. *See, e.g., Kulle v. I.N.S.*, 825 F.2d 1188, 1192-1193 (7th Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988) ("none of these distinctions [between death camps and concentration camps of forced labor] makes a difference"); *United States v. Kairys*, 782 F.2d 1374, 1378 (7th Cir.), *cert. denied*, 476 U.S. 1153 (1986) ("we find nothing significant to distinguish armed guard service at a labor camp from such service at a concentration camp"). Federenko, like Schmidt, carried a gun, was paid, wore a uni-

form, was allowed to leave the camp, and denied participation in any atrocities. However, unlike with respect to Schmidt, others testified that Federenko had in fact committed acts of violence against prisoners, and Federenko testified that, upon orders, he had once shot in the direction of fleeing prisoners and that he was aware that Jewish inmates were being killed. *Federenko*, 449 U.S. at 494, 498, 500. Nevertheless, the Supreme Court held that it was not relevant whether Federenko had ever injured a prisoner or whether his service was voluntary. *See also Kulle*, 825 F.2d at 1192; *Schellong v. I.N.S.*, 805 F.2d 655, 657 (7th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987); *Kairys*, 782 F.2d at 1378 (no evidence of personal involvement in any atrocities necessary). The DPA requires only that an individual assist in the persecution of persons because of race, religion or national origin to be denied a visa. "[T]here can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians." *Federenko*, 449 U.S. at 512, n. 34.

Based upon the above, it is irrelevant whether Schmidt voluntarily joined the SS and whether he ever personally committed any atrocities. It is clear that his guarding of prisoners at Sachsenhausen by carrying a gun, preventing them from fleeing and forcing them to engage in forced labor, constituted assistance in the persecution of civilians, which rendered him ineligible for a visa under the DPA. *See United States v. Kairys*, 600 F. Supp. 1254, 1271 (N.D. Ill. 1984), *affirmed*, 782 F.2d 1374 (7th Cir. 1986) (armed guard at concentration camp is not eligible for a

visa under DPA and cannot lawfully procure citizenship); *Dercacz*, 530 F. Supp. at 1351-1352 (same). "Nazi concentration camps were places of persecution; individuals who, armed with guns, held the prisoners captive and prodded them into forced labor with threats of death or capital punishment cannot deny that they aided the Nazis in their program of racial, political, and religious oppression." *Schellong*, 805 F.2d at 661.

Schmidt also argues that his case is different from that of Federenko because he did not know that he was assisting in committing atrocities. Schmidt admits, however, that he was aware that the prison housed homosexuals, and there is undisputed evidence that prisoners wore patches denoting their status (Jew, homosexual, Jehovah's Witness, etc.). Claims by prison guards that they were unaware of the persecution and believed that the prisoners were there because they had broken German law have been rejected by the Seventh Circuit as "incredible." *See Schellong*, 805 F.2d at 661.

Regardless, we need not determine whether Schmidt knew his actions assisted the Nazis to commit atrocities. Schmidt clearly knew that he was preventing prisoners from escaping and forcing them to work, by guarding them with a gun. Whether he knew that they were unjustly imprisoned, that their living conditions were atrocious, or that other guards physically abused them, is irrelevant. The DPA does not require that Schmidt's assistance was voluntary or "knowing" in the sense that he understood fully the system he was helping to preserve and function. The DPA, like Section 241(a)(19) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(19), is concerned with those who "assisted . . . in the persecution of any person because of race, religion, [or] national origin. . . ." The Seventh Circuit has held that under

§ 241(a)(19), assistance in persecution is to be viewed very broadly. No proof of actual knowledge need be presented. *Kulle*, 825 F.2d at 1193.

Therefore, we hold that no proof that Schmidt knew precisely what was going on within the camp is necessary to find that he assisted in the persecution that was in fact occurring. We hold that the government is entitled to summary judgment on Count I, which seeks denaturalization on the ground that Schmidt was not lawfully admitted into the United States because he in fact assisted in the persecution of persons because of their race, religion or national origin by serving as an armed guard at Sachsenhausen concentration camp.

Defenses

Defendant argues that the government should be barred by laches and estopped from pursuing this action. He argues that the presence in the government's files of the notation that one Michael Schmidt is listed as a guard on a death march from Vienna to Mauthausen, Exhibit 6.4, shows that the government knew at the time of Schmidt's application for a visa that he might have been a guard at a concentration camp. Therefore, he argues that the government cannot now revoke citizenship on the basis of information it already had.

We find this argument severely flawed. First, the government seeks to revoke Schmidt's citizenship because he was a guard at Sachsenhausen. There is no evidence that the government had this information at any time prior to the granting of citizenship to Schmidt. Further, it is clear that the Michael Schmidt referred to in the report is not *this* Michael Schmidt (the name is not that uncommon). No one suggests that Defendant herein was

ever at Mauthausen or that he was a guard on a death march from Vienna to Mauthausen. What appears fairly clear is that this information was passed to the people reviewing Defendant's application for a visa, and that they found that it referred to a different Michael Schmidt and disregarded it. We do not think that this is sufficient evidence to create a triable issue of fact as to whether the government was on notice that Defendant was a guard at Sachsenhausen concentration camp, particularly in light of the uncontradicted affidavits of Zipf (Exhibit 9.2), Lanius (Exhibit 9.3), and Reinfeld (Exhibit 9.5), all of whom state that they would have rejected Defendant's application if they had known Defendant was a guard at a concentration camp. Hence, we find no basis for Defendant's claims for laches and estoppel. They do not bar the granting of summary judgment in favor of the government.

Aside from the brief statement in Exhibit 6.4 concerning another Michael Schmidt, Defendant has presented no evidence to support its affirmative defenses. There has been no showing of prejudice, nor is there any other evidence that the United States knew earlier of Schmidt's activities and failed to act. To assert laches, Defendant must demonstrate lack of diligence and prejudice. *Kairys*, 782 F.2d at 1384. We find that Defendant has failed to raise any genuine issue of fact as to his defenses of laches and estoppel which would preclude summary judgment. He has failed to present sufficient evidence to support these defenses and the government is granted summary judgment on the questions of laches and estoppel.

Finally, we hold that laches and estoppel are not defenses to denaturalization proceedings. *See Federenko*, 449 U.S. 516-518 (in denaturalization, court may not consider the equities but must follow the statutory mandate of Congress); *Costello v. United States*, 365 U.S. 265, 281

(1961) (laches is not a defense against the sovereign); *Kairys*, 600 F. Supp. at 1264 (government cannot be barred by laches in denaturalization proceeding), *affirmed on other grounds*, 782 F.2d 1374 (expressly declining to rule on whether laches could ever be a defense to denaturalization). Therefore, we find that summary judgment in favor of the government is not barred by laches or estoppel.

Conclusion

Summary judgment is granted to the United States on Count I. Defendant's citizenship is revoked, his Certificate of Naturalization is cancelled, and he is ordered to surrender and deliver the Certificate of Naturalization to the Attorney General.

ENTER:

/s/ PAUL E. PLUNKETT
United States District Judge

DATED: January 3, 1990

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No. 91-87 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL SCHMIDT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's service as an armed guard at a Nazi concentration camp constituted "assist[ance] in * * * persecution" within the meaning of Section 13 of the Displaced Persons Act of 1948.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 923 F.2d 1253. The memorandum opinion and order of the district court (Pet. App. 21-40) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1991. A petition for rehearing was denied on June 4, 1991 (Pet. App. 18-19). The petition for a writ of certiorari was filed on July 12, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was born in Scharosch, Romania, of German parentage. In June 1943, he was inducted into the Waffen SS, the military branch of the SS, and was assigned to serve at the Sachsenhausen concentration camp near Oraneinburg, Germany. Petitioner was a member of the "Death Head's Battalion" until September 1944. During petitioner's service at Sachsenhausen, the camp was the second largest Nazi concentration camp; only Auschwitz was larger. Among those incarcerated at Sachsenshausen were Jews, Jehovah's Witnesses, certain Eastern European ethnics, gypsies, political dissidents, homosexuals, and various individuals considered social misfits, including beggars, vagrants, and the mentally ill. Individuals belonging to each category of prisoner were forced to wear colored triangles on the outside of their uniforms that identified them as belonging to that category. At the height of its operation, Sachsenhausen housed approximately 50,000 prisoners. Pet. App. 2-3, 25.

The Death Head's Battalion was organized as part of the Waffen SS for the purpose of guarding Nazi concentration camps. Petitioner was assigned to guard prisoners on forced labor crews outside Sachsenhausen. His duties included escorting prisoners to and from work sites, counting prisoners before returning them to the concentration camp, and keeping prisoners in formation. Petitioner wore on his uniform the skull and crossbones insignia of the Death Head's Battalion. He carried a rifle and ammunition and had orders to shoot at prisoners who attempted to escape. Because concentration camp guards were not permitted to enter the camps, petitioner was confined to patrol outside the camp wall. Pet. App. 3-4.

Although there is no evidence that petitioner personally killed prisoners, it has been documented that during the period he served at Sachsenhausen, two Jews were intentionally murdered and at least 13 prisoners were executed by being shot through the nape of the neck. In addition, tens of thousands died in Sachsenhausen as a result of starvation, exhaustion, beatings, exposure, disease, and bizarre medical experimentation. Pet. App. 4.

Petitioner continued to serve as an armed guard at Sachsenhausen until September 1944. He then served in the Third Battalion of the 38th SS Armed Infantry Division, "Goetz von Berlichingen," and was wounded in combat in Lorraine, France, on November 28, 1944. He remained in military hospitals until he became a British prisoner of war. He was released on July 8, 1946. Pet. App. 4.

2. After living in Germany and Austria for several years following the war, petitioner applied for a determination that he was a "displaced person" eligible to emigrate to the United States under the Displaced Persons Act of 1948 (DPA), ch. 647, 62 Stat. 1009, as amended by the Act of June 16, 1950, ch. 262, 64 Stat. 219.[1] On his application, petitioner indicated that he was conscripted into the "German Army, Waffen-SS 'Goetz von Berlichingen,' " but he did not indicate that he had served as a guard at Sachsenhausen. Based on petitioner's representations

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[1] Congress enacted the DPA to accommodate the large number of European refugees wishing to emigrate to the United States after World War II. Pet. App. 5. A person seeking to obtain an immigration visa under the DPA was required to obtain a designation of "displaced person" status as defined by the Constitution of the International Refugee Organization (IRO), Dec. 16, 1946, 62 Stat. 3037, T.I.A.S. No. 1846, 18 U.N.T.S. 3. See DPA § 2(b), 62 Stat. 1009.

in his application, he was certified as a displaced person eligible for a visa. Petitioner obtained the visa in April 1952 and, on May 24, 1952, he entered the United States. Pet. App. 6.

On March 1, 1968, petitioner applied for naturalization. Question 7 of the application form required him to list "present and past membership in every organization, association, fund, foundation, party, club, society, or similar group in the United States and in any other place, and your foreign military service." Petitioner claimed military service in the German army from 1943 to 1945, and did not indicate that he had served as an armed guard at Sachsenhausen from June 1943 to September 1944. On April 2, 1968, petitioner was naturalized as a United States citizen. Pet. App. 6.

3. On November 2, 1988, the government brought suit under Section 340(a) of the Immigration and Nationality Act, 8 U.S.C. 1451(a), to revoke petitioner's citizenship. The district court entered summary judgment for the government on Count 1 of the complaint, which alleged that, as a result of his service as an armed guard at a concentration camp, petitioner had been ineligible for a visa under Section 13 of the DPA, 62 Stat. 1014, and therefore was not lawfully naturalized under 8 U.S.C. 1427(a)(1). In pertinent part, Section 13 of the DPA prohibited granting a visa for "any person who * * * assisted in the persecution of any person because of race, religion or national origin." 64 Stat. 227. The district court concluded that petitioner's "guarding of prisoners at Sachsenhausen by carrying a gun, preventing them from fleeing and forcing them to engage in forced labor, constituted assistance in the persecution of civilians, which rendered him ineligible for a visa

under the DPA." Pet. App. 36. The district court rejected petitioner's contention that he did not assist in persecution because he did not serve voluntarily, did not personally commit acts of atrocity, and did not know that his acts assisted the Nazis in committing atrocities. *Id.* at 37-38.[2]

4. On appeal, petitioner reiterated his contention that his service as an armed guard at the Sachsenhausen concentration camp did not constitute assistance in persecution. Like the district court, the court of appeals rejected that argument. The court first pointed out that, under *Fedorenko* v. *United States*, 449 U.S. 490 (1981), voluntariness is not an element of assistance in persecution. The court then rejected petitioner's assertion that assistance in persecution could not be found because he claimed that he did not personally commit atrocities. The court concluded that "even if [petitioner] personally did not participate in the brutal acts committed at Sachsenhausen, the fact of his armed, uniformed service is sufficient to establish that he assisted in persecution." Pet. App. 10-11. The court explained:

> [Petitioner] carried a gun and wore the uniform of the dreaded "Death Head's Battalion." He guarded Jews, Gypsies, Jehovah's Witnesses, Eastern European nationals, and other persecuted peoples and forced them to do the bidding of the Third Reich. [Petitioner] prevented these

[2] The government's complaint also included seven other grounds for denaturalization, such as willful misrepresentation and concealment, false testimony, and voluntary participation in bearing arms against the United States; the government also moved for summary judgment on three of these additional counts. In light of its decision to grant summary judgment on Count 1, the district court found it unnecessary to address the other counts. Pet. App. 22-23.

> prisoners from fleeing, and subjected them to forced labor under unspeakably brutal conditions. Such employment removed [petitioner] from the intended scope of those to be aided by the DPA.

Pet. App. 12.[3]

Judge Pell dissented, believing that petitioner was entitled to a trial on the issue of knowledge. Pet. App. 13-16.

ARGUMENT

1. Petitioner maintains that, despite his service as an armed guard at the Sachsenhausen concentration camp, it cannot be established that he "assisted in the persecution" of other persons, within the meaning of Section 13 of the DPA, without proof that he personally committed, or knew of, acts of persecution within the concentration camp. Pet. 9-15. Petitioner's contention is erroneous.

The court of appeals correctly held that petitioner's service as an armed guard at the concentration camp sufficiently established assistance in persecution. In *Fedorenko* v. *United States*, 449 U.S. 490 (1981), this Court held that, under the DPA, "an individ-

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[3] The court also observed that, although proof of petitioner's "actual knowledge" of the events occurring inside Sachsenhausen was "unnecessary" to a conclusion that he assisted in persecuting its inhabitants, the court found petitioner's assertion of ignorance "belied by the fact that he guarded concentration camp prisoners who wore colorcoded patches to signify their racial, ethnic, social or political status." Pet. App. 9 n.8. Petitioner's assertion of ignorance was similarly belied by the fact that his "primary job was to escort prisoners to and from forced labor sites" where "[s]ome collapsed at work, and many later died from the combined effects of starvation and exhaustion." *Ibid.*

ual's service as a concentration camp armed guard—whether voluntary or involuntary—made him ineligible for a visa." *Id.* at 512. The Court emphasized the plain language of the statute, the legislative history, and the administrative history, in which service as an armed guard at a concentration camp was consistently found to disqualify an individual from visa eligibility. *Id.* at 512-513. Considering a continuum of behavior beginning with the passive cutting of prisoners' hair and ending with service as an armed guard at a concentration camp, the Court held that the latter clearly constituted assistance in persecution:

> [T]here can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians. Other cases may present more difficult line-drawing problems but we need decide only this case.

449 U.S. at 512-513 n.34.[4]

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[4] *Fedorenko* involved a slightly different statutory provision from the provision at issue here. *Fedorenko* concerned Section 2(b) of the DPA, and the IRO Constitution's definition of displaced persons that it incorporated. See note 1, *supra*; *Fedorenko*, 449 U.S. at 495 & nn.3 and 4. The IRO Constitution excluded "[a]ny * * * persons who can be shown * * * to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations." Annex I, Pt. II, 62 Stat. 3051; *Fedorenko*, 449 U.S. at 495 n.4. Section 13 of the DPA was revised in 1950 to add to the DPA itself a very

The evidence against petitioner is similar to the evidence against Fedorenko. Like Fedorenko, petitioner was a guard at a concentration camp. Pet. App. 3-4. Like Fedorenko, petitioner guarded inmates while wearing a uniform and carrying a rifle and ammunition. *Id.* at 3. Like Fedorenko, petitioner was under orders to shoot at escaping prisoners. *Ibid.* Like Fedorenko, petitioner was paid a salary and took occasional leave. *Id.* at 26. Since the government sufficiently established each of those elements, the court of appeals did not err in upholding petitioner's denaturalization.[5]

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similar prohibition based on assistance in persecution. See Act of June 16, 1950 ch. 262, § 11, 64 Stat. 227 (excluding "any person who * * * assisted in the persecution of any person because of race, religion, or national origin"). Both provisions thus barred individuals found to have "assisted in" persecution. Petitioner has not claimed that any difference in the provisions requires a different analysis of the assistance in persecution issue, and such a claim would not be tenable.

[5] As noted, in *Fedorenko*, this Court took note of the fact that Fedorenko admitted to shooting at escaping inmates. 449 U.S. at 512 n.34. Petitioner attempts to distinguish *Fedorenko* on the basis that he made no such admission. Pet. 12. Petitioner's reliance on that statement, however, focuses on a single statement taken out of context and ignores the thrust of this Court's decision, *i.e.*, that "an individual's service as a concentration camp armed guard—whether voluntary or involuntary—made him ineligible for a visa." 449 U.S. at 512. In *United States* v. *Kairys*, 782 F.2d 1374, 1378, cert. denied, 476 U.S. 1153 (1986), the Seventh Circuit explained that the fact of Fedorenko's shooting distinguishes his "position as a camp guard from those concentration camp *survivors* who were forced to perform tasks within the camp. Thus in cases not involving armed guards * * *, a showing of personal involvement in persecutions may be necessary. Nonetheless, *Fedorenko* continues to stand for the proposition that service as an armed guard equals persecution."

Petitioner nevertheless argues that he was impermissibly found to have assisted in persecution because of his "status" as an armed concentration camp guard and not because of any particular conduct in which he personally engaged. Pet. 9. Yet, by preventing inmates from escaping, an individual serving as an armed guard at a concentration camp necessarily performed functions "contributing to the collective effort of the Nazis to persecute innocent civilians." Pet. App. 10. See also *Schellong* v. *INS*, 805 F.2d 655, 660-661 (7th Cir.) ("Nazi concentration camps were places of persecution; individuals who, armed with guns, held the prisoners captive and prodded them into forced labor with threats of death or capital punishment cannot deny that they aided the Nazis in their program of racial, political and religious oppression."), cert. denied, 481 U.S. 1004 (1986); *Kulle* v. *INS*, 825 F.2d 1188, 1192 (7th Cir. 1987), cert. denied, 484 U.S. 1042 (1988). Indeed, the court of appeals explicitly emphasized the persecutive acts in which petitioner admitted engaging as part of his service as an armed guard—carrying a gun, wearing the uniform of the Death Head's Battalion, guarding various "persecuted peoples and forc[ing] them to do the bidding of the Third Reich," preventing those persecuted peoples from fleeing, and subjecting them to forced labor under "unspeakably brutal" conditions. Pet. App. 12.

Petitioner's contention that he should not have been found to have assisted in persecution without proof that he personally committed or knew of the atrocities within the concentration camp would add a new statutory condition to Section 13 of the DPA. That provision is broadly directed at any individual who "assisted in * * * persecution" based on race, religion,

or national origin. In *Fedorenko*, this Court rejected a similar request to create a requirement not found in the statute itself. As the Court explained, "We are not at liberty to imply a condition which is opposed to the explicit terms of the statute. . . . To [so] hold . . . is not to construe the Act but to amend it." 449 U.S. at 513, quoting *Detroit Trust Co.* v. *The Thomas Barlum*, 293 U.S. 21, 38 (1934). That principle of statutory construction is equally applicable here.[6]

2. Petitioner contends that the court of appeals' decision conflicts with decisions from the Second and Ninth Circuits. Pet. 16-22. That contention is incorrect.

Petitioner relies on *United States* v. *Sprogis*, 763 F.2d 115 (2d Cir. 1985), and *Laipenieks* v. *INS*, 750 F.2d 1427 (9th Cir. 1985). As the Seventh Circuit has previously pointed out, however, both decisions are distinguishable from the situation presented by an armed guard at a concentration camp. *Schellong* v. *INS*, 805 F.2d 655, 661, cert. denied, 481 U.S. 1004 (1986). Both *Sprogis* and *Laipenieks* concerned, not concentration camp guards, but local policemen who were not involved in the operation of concentration camps (and who were not members of the SS). See *Sprogis*, 763 F.2d at 122-123; *Laipenieks*, 750 F.2d at 1429. Unlike the responsibilities of a local policeman, the duties of a concentration camp guard necessarily entailed assistance in the persecution of inmates. No court of appeals decision has held that

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[6] As in *Fedorenko*, 449 U.S. at 498-500, 513, moreover, uncontroverted evidence before the district court establishes the contemporaneous administrative interpretation, in which known concentration camp guards were routinely denied entry visas on the ground that their service as guards rendered them ineligible for visas. Pet. App. 32-34.

service as an armed guard at a concentration camp is insufficient to establish assistance in persecution. Accordingly, there is no conflict among the circuits meriting this Court's review.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1991

[7] In light of petitioner's reliance on the Ninth Circuit's *Laipenieks* decision, we note that a recent unpublished decision from that court has held that proof of service as a guard at the Auschwitz concentration camp is sufficient to establish participation in persecution. *United States* v. *Paal*, No. 90-10480 (July 5, 1991), slip op. 3 n.2.

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No. 91-87

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OCTOBER TERM, 1991

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Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Government, and the lower Courts, take the position that the knowledge of a German soldier who guards the outside of a German prison is irrelevant; that he must be denaturalized because he was German soldier and because he did escort prisoners to places of work in the civilian community during World War II from a prison called "Sachsenhausen".

Michael Schmidt has testified that he harmed no one, that no one was harmed in his presence, that he never saw a prisoner die, and that he was never inside, and never saw inside, Sachsenhausen. No affidavit contradicts this testimony.

Against this, and with such overwhelming power that summary judgment was granted, the Government argues that fifteen prisoners were executed *inside* the prison (including two Jewish persons) and that Sachsenhausen was, indeed, a cruel prison. None of this is alleged to have been known to Michael Schmidt, and he says, under oath, that he did not know of it. He was outside, that was inside.

And, Schmidt also testified that his unit was a combat unit trained as such which, after a time at the prison near Berlin, went into combat, at which point he was wounded.

We do, thus, have a case in which a person is denaturalized without any finding that he did anything morally wrong.

The Government brief does not answer this point; it argues, rather, that the Nazi regime was morally wrong (an easy point to make) and that Schmidt was there (which he was). From that comes summary judgment.

I.

THERE IS NO AUTHORITY EXCEPT THE SEVENTH CIRCUIT FOR THE PROPOSITION THAT THE DISPLACED PERSONS ACT IS A STRICT LIABILITY STATUTE.

The Government argues that the Displaced Persons Act requires nothing beyond proof of presence as a member of a guard unit at Sachsenhausen during World War II. All else is irrelevant, and the Seventh Circuit, and the trial judge, specifically so hold and agree.

No other circuit, and no other court, has so ruled. The prior Seventh Circuit cases, cases in which the Germans did identifiable acts of cruelty, did contain language which could support such a construction of *Fedorenko*, but no

other cases so hold. *Fedorenko v. United States*, 449 U.S. 490 (1981).

And, the present holding, and its result, removes from the naturalized citizen even the protections afforded by the case law on visa fraud; we now have a strict liability statute based on presence, and so the teachings of *Kungys* would not apply. *Kungys v. United States*, 485 U.S. 759 (1988).

The Government argues visa fraud in its Brief in Opposition, but this is not a visa fraud case; it is a summary judgment case in which there is an issue of fact, and nothing more. Only by imposing strict liability based on presence and membership can it be argued that there is no material issue of fact.

II.

THE CONFLICT BETWEEN THE CIRCUITS REMAINS.

The Government argues that *United States v. Paal*, Slip Op. No. 90-10480 (9th Cir. July 5, 1991) overrules *Laipenieks v. INS*, 750 F.2d 1427 (9th Cir. 1985), thus reducing the conflict to a conflict between the Second and Seventh Circuits.

United States v. Paal is a conviction under 18 U.S.C. sec. 1001. The defendant was convicted after a criminal trial, of a violation of 18 U.S.C. sec. 1001 for making a false statement in a visa application. Paal had a full hearing, and was found to have wilfully lied on a visa application.

Laipenieks was a deportation case, and the question related to his actions in persecuting Communists, and it was held that the evidence of persecution was, as a matter of law, insufficient. *Laipenieks*, plainly, stands.

CONCLUSION

A person should not be denaturalized on a status test. Issues of fact exist, knowledge should be considered, and Michael Schmidt should have a trial. We pray that the writ issue.

Respectfully submitted,

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SUPPLEMENT TO REPLY BRIEF FOR PETITIONER

May It Please The Court:

On September 30, 1991, the Sixth Circuit held, in *Petkiewytsch v. Immigration and Naturalization Service*, No. 90-3952, that the language of the Holtzman Act and the DPA Act (based upon the Holtzman Act) requires proof that the person to be deported be within the "war criminal" class, that he be one of "the perpetrators of the Holocaust" (Slip Opinion, p. 18), and that Petkiewytsch, who was a guard and who was aware of the prisoners being tortured and executed but who did no wrongful act

himself, was not deportable as a persecutor. The Court judged the act of the defendant, and refused to decide the case on the basis of presence as an armed guard at a place of persecution.

The Sixth Circuit presents the precise conflict between the Circuits at Slip Opinion, p. 15, and decides to follow *Laipenieks v. INS*, 750 F.2d 1427 (9th Cir. 1985), and not the holdings of the Seventh Circuit with which *Laipenieks* conflicts.

And, the Sixth Circuit studies and presents the legislative history, noting that Representative Holtzman explained her bill as containing "an amendment that limits the language of the bill solely to those persons who engaged in war crimes". Slip Opinion p. 17, 134 Cong. Rec. 31,647. Michael Schmidt has never been claimed to have committed a war crime.

The Board of Immigration Appeals, in *Petkiewytsch*, held exactly as did the Seventh Circuit in this case; its holding is paraphrased at Slip Opinion 7:

> "The Board thus concluded that the petitioner was deportable under the Holtzman Amendment because of his duties as a guard at a camp where persons were persecuted based upon race, religion, national origin or political opinion."

It was that holding that was reversed, and that reversal places the Sixth Circuit in exact conflict with the opinion of the Seventh Circuit in this case.

And, the Government argued there, as they do here (Slip Opinion 12) that *Fedorenko v. United States*, 449 U.S. 490 (1981) demonstrates that "It is enough . . . that the petitioner wore a uniform and carried a loaded weapon and his job was to prevent the escape of those confined and subject to persecution".

It was that exact contention, made successfully to the Seventh Circuit, that was rejected by the Sixth Circuit. The conflict is precise.

We say that the acts and deeds of the individual must be judged. The Government says presence, as a guard, is all the proof it needs. The Circuits disagree, and we now ask a resolution of that conflict.

And *Petkiewytsch* demonstrates from the legislative history that Congress intended to exclude or deport those persons who did some act, and not those persons who were present at a place where an act was done. Petkiewytsch knew of those acts but did not participate. Schmidt, outside a walled prison to which he was forbidden entry, did not know as much as Petkiewytsch.

CONCLUSION

We ask that the Court consider the *Petkiewytsch* case in its consideration of this petition.

Respectfully submitted,

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Attorneys for Petitioner

(5)

No. 91-87

FILED
OCT 21 1991

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL SCHMIDT,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals of the Seventh Circuit

AMICUS CURIAE OF THE PARISH COUNCIL OF OUR LADY OF LOURDES CATHOLIC CHURCH, THE DANUBE-SWABIAN ASSOCIATION, USA, INC., THE TRICENTENNIAL FOUNDATION, THE AMERICAN AID SOCIETY OF GERMAN DESCENDANTS, AND THE INSTITUTE FOR GERMAN-AMERICAN RELATIONS

(SUPPORTING PETITIONER)

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Attorneys for the Amici Curiae

Case No. 91-87

IN THE UNITED STATES SUPREME COURT
1991-92 Term

MICHAEL SCHMIDT, Petitioner-Defendant

vs.

UNITED STATES, Respondent-Plaintiff

MOTION FOR LEAVE TO FILE
AMICUS BRIEF AND FOR OUT-OF-TIME FILING

The Parish Council of Our Lady of Lourdes Catholic Church, Milwaukee, WI, the Danube-Swabian Association, USA, Inc., Warren, MI, the Tricentennial Foundation, Sepulveda, CA, the American Aid Society of German Descendants, Chicago, IL, and the Institute for German-American Relations, Pittsburgh, PA, acting through counsel, and praying that this Court waive the time requirements of Rule 36.2 for the filing of this Motion, hereby request leave of

this Court to file a brief as amici curiae in the above-entitled appeal. Further, leave of Court for out-of-time filing is respectfully requested.

As required by Rule 36.2, the proposed brief accompanies this motion.

The amici curiae, as set forth further in the brief itself, are groups of American citizens deeply concerned about an increasing, institutionalized denial of citizens' rights by the Office of Special Investigations (OSI) of the United States Justice Department's Criminal Division, particularly in recent denaturalization and deportation proceedings.

The amici curiae view Schmidt's petition to the Supreme Court as very important because the OSI's disregard for Schmidt's rights, as reflected in the OSI's arguments against him, typifies a

dangerous new tack in OSI prosecution practices.

This amicus brief describes key characteristics of this growing new tack, and asks this Court for help. While Schmidt's counsel concentrates on the narrow question of denial of trial (certainly important to Schmidt), the attached brief deals more directly with the substantive issues raised by the OSI's current efforts against many citizens:

-use of mere guard-status as grounds for a finding of "persecution";

-persistent misapplication of this Court's Fedorenko decision in an effort to find a per se rule which this Court never intended; and

-attempts to strip away knowledge and intent as elements of "persecution," even in the absence of active wrongful conduct.

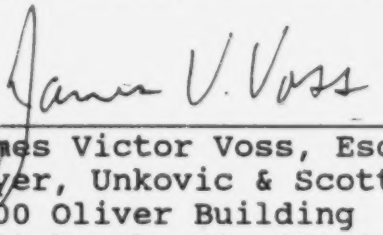
These issues are relevant to disposition of the case, just as they were relevant in disposition of the just-issued Sixth Circuit case of Petkiewytsch v. INS, decided September 30, 1991. Unlike the briefs of the parties in the instant case, the attached amicus brief cites and applies the very thorough Petkiewytsch decision. Petkiewytsch appears to be the most thorough judicial analysis to date of precisely the substantive questions important to Schmidt's appeal.

The amici curiae sought consent of both parties. Consent was granted by Schmidt, after refusal by his counsel. The OSI refused its consent, just as it did earlier when requested to consent to proposed filing of an amicus brief with the Seventh Circuit.

This brief would have been prepared

and filed earlier had the attorneys earlier been aware of the Seventh Circuit's denial of rehearing. The brief was filed promptly when this fact became known and the amici requested that this brief be filed.

Respectfully Submitted,



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Case No. 91-87

IN THE UNITED STATES SUPREME COURT
1991-92 Term

MICHAEL SCHMIDT, Petitioner-Defendant

vs.

UNITED STATES, Respondent-Plaintiff

On Writ of Certiorari to the United States Court of Appeals of the Seventh Circuit

AMICUS CURIAE BRIEF OF THE PARISH COUNCIL OF OUR LADY OF LOURDES CATHOLIC CHURCH, THE DANUBE-SWABIAN ASSOCIATION, USA, INC. THE TRICENTENNIAL FOUNDATION, THE AMERICAN AID SOCIETY OF GERMAN DESCENDANTS, AND THE INSTITUTE FOR GERMAN-AMERICAN RELATIONS

(Supporting Michael Schmidt)

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INTEREST OF THE AMICI CURIAE

The amici curiae are groups of American citizens deeply concerned about an increasing, institutionalized denial of citizens' rights by the Office of Special Investigations (OSI) of the United States Justice Department's Criminal Division, particularly in recent denaturalization and deportation proceedings.

Michael Schmidt is a long-time American citizen who is innocent of involvement in Nazi persecution by any reasonable standard of law. The amici curiae see the OSI's attacks against Schmidt and others, including many friends and neighbors, as gross perversions of the law.

The amici curiae view Schmidt's petition to the Supreme Court as critically important because the OSI's disregard for Schmidt's rights, as reflected in the OSI's positions and arguments against him,

typifies a dangerous new tack in OSI practices. This amicus brief describes key characteristics of this new approach, and asks this Court to stop it.

The enormous strength and perhaps-even-excessive motivation of the OSI's prosecutorial machine, applied against an aging group of low-level World War II conscriptees who cannot begin to afford the kinds of defense the OSI's assaults demand, are matters of grave concern to the amici curiae. The OSI's assaults against Schmidt and others are assaults on their fellow American citizens.

The amici curiae recognize the OSI's massive strength and the lack of effective legislative and administrative oversight as a prescription for massive denials of citizens' rights. They see such abuses occurring at an accelerating pace, even as the 1940's fall more decades into the past.

In view of the mixed signals coming from various appeals courts and the OSI's persistence in applying unreasonable rules and standards, the amici curiae understand that the intervention of this Court is needed to bring reform to the administration of justice in an area of great and particular importance to them.

The interest of the amici curiae is shown further by their attached letters.

ARGUMENT

Mere Status As a Guard Is Insufficient As Grounds For a Holding of Assistance In Persecution Because of Race, Religion, National Origin or Political Opinion.

Unable to find a continuing stream of defendants who actively assisted in Nazi persecution because of race, religion, national origin or political opinion, the OSI is increasingly, as in Schmidt's case, basing its complaints against aging Ameri-

can citizens merely upon their status as guards some 40-50 years ago -- rather than on allegations of specific active wrongful conduct.

The OSI's accusations against Schmidt with respect to his service during the war all relate to status. He is not accused of ever hurting anyone during his time as a guard, of ever shooting anyone or at anyone, of ever striking or even shoving anyone, or of ever having seen any such things. Schmidt admitted serving as a guard outside a walled prison, and this alone was the basis for the summary judgment against him.

The very recent unanimous decision of the Sixth Circuit Court of Appeals in the case of Petkiewytsch v. INS, (decided September 30, 1991; decision attached), is the most thorough judicial analysis to date of precisely the substantive ques-

tions raised in the instant appeal. Its logic and ruling clash directly with the Seventh Circuit decision from which Schmidt here appeals. The Sixth Circuit's review of legislative histories and case law clearly compelled its decision that mere status as a guard does not satisfy the statutory language regarding "persecution." This Court should adopt the Sixth Circuit's rationale on the guard-status issue and related issues.

Like Schmidt, Petkiewytsch was a guard against whom no accusations of active wrongdoing were made. The Petkiewytsch decision is commended to the Court.

Turning for a moment to a procedural issue in the instant case, the district court ignored undisputed evidence of admirable conduct by Schmidt and found guilt by status on summary judgment,

denaturalizing citizen Schmidt for "assisting in persecution" without even giving him a chance to stand before a court, even once. Summary judgment clearly denied Schmidt an appropriate opportunity to defend himself.

It is ironic that the Seventh Circuit, in the portion of its 2-1 majority opinion which described the horrors of the Third Reich, referred to "incarceration without trial for indefinite periods of time." Michael Schmidt, too, has been denied a trial, despite the absence of any specific active-conduct charge against him and despite his long-time status as an American citizen. Furthermore, for three and one-half years this retired janitor and his family have been put through hell at the hands of our government, despite the fact that, in the words of the Sixth Circuit in the Petkiewytsch decision:

> "Deporting this petitioner would not further the Holtzman Amendment and would carry out no discernable policy of the United States." (page 20)

This Court should overturn the decision of the Seventh Circuit in the instant case, and stop the OSI from accusing elderly Americans of having "assisted in persecution" based merely on their former status as guards.

The Per Se Rule Urged By the OSI Is Not Found in the Fedorenko Decision.

A key part of the OSI's current approach to condemning merely on the basis of status is a gross misapplication of the Supreme Court's decision in Fedorenko v. United States, 449 US 490 (1981).

The OSI makes much of a portion of footnote 34 of the Fedorenko decision which states, "[T]here can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed

to leave the concentration camp ... fits within the statutory language about persons who assisted in the persecution of civilians." When they generalize this footnote statement, the OSI attorneys misread it and the intent of the decision.

If the Court had intended Fedorenko to establish the ironclad per se rule urged by the OSI, it would not have been put in a footnote. In fact, it is only reasonable to read "a guard who" as the Court's way of referring to Fedorenko in particular. But not all guards were like Fedorenko; Schmidt most certainly was not.

Indeed, the Supreme Court's clear intent, as set forth later in the same footnote, is that cases be examined on a case-by-case basis. The Court said:

> "Other cases may present more difficult line-drawing problems but we need decide only this case."

In its arguments against Schmidt, the

OSI has contended that Fedorenko and its progeny focus on the conduct of a typical armed guard of prisoners at a concentration camp to hold that guard duty per se renders a visa applicant under the DPA ineligible for a visa. In fact, however, the cases since Fedorenko have looked at individual conduct, and that was just as Fedorenko commands.

Perhaps the strict per se rule urged by the OSI would be acceptable if applied at a time before citizenship rights have accrued to an individual, as in Kulle v. INS, 825 F2d 1188 (CA7 1987). But after rights have accrued, as in Schmidt's and other denaturalization cases, Fedorenko clearly does not close the door to showings of fact contrary to the OSI's expectations of the typical guard.

Fedorenko was never intended as the simplistic per se tool that OSI urges for

use against prison and camp guards of the World War II era. The crack in the door was not slammed shut.

Summary judgment, as in Schmidt's case, precludes the sort of detailed analysis which the Supreme Court calls for in Fedorenko. See also Petkiewytsch, supra. For that reason alone, the lower court should be reversed in the present matter.

This Court should correct the persistent misapplication of its 1981 Fedorenko by the OSI.

Knowledge Is an Essential Element of Persecution For Race, Religion, National Origin or Political Opinion.

Because of the OSI's inability to allege active wrongful conduct, the OSI now often finds it necessary, as in Schmidt's case, to go to the extreme of arguing that a person whom it could not accuse of persecution in the form of specific wrongful conduct need not even

have had concurrent knowledge of persecution because of race, religion, national origin or political opinion.

This leads to an unusual conclusion, to wit: A long-time American citizen who, as an eastern European teenager of German heritage conscripted by the Germans, did not actively assist in Nazi persecution 50 years ago and did not have knowledge of Nazi persecution on grounds of race, religion, national origin or political opinion, nonetheless must be denaturalized by a federal court, without trial, on a summary finding of having "advocated or assisted in persecution on grounds of race, religion, national origin or political opinion."

The OSI's misreading of Fedorenko is part of its effort to skirt the knowledge issue. The OSI has argued that enforcing concentration camp enslavement through

service as a guard is conduct which per se constitutes the assistance in persecution proscribed by the DPA. This is a dramatic overstatment of Fedorenko. In fact, that Supreme Court decision makes it very clear that Fedorenko knew what was going on at the Treblinka concentration camp. He knew there was persecution, and he knew it was for reasons of race, religion, national origin or political opinion. To imply that such knowledge is unnecessary is simply wrong. That view cannot stand under the light of Fedorenko.

Knowledge and intent must be elements of "assisting in persecution." The idea of unintentional persecution is a contradiction in terms. As Judge Pell said in his dissent below,

> "I cannot conceive how a person can be rendering assistance in persecution without some showable knowledge ... ."

This Court should require that knowledge of persecution on grounds of race, religion, national origin or political opinion be a prerequisite to a finding of actionable "assistance in persecution," certainly at least in the absence of specific allegations of active wrongful conduct.

The Lower Court Decisions in the Instant Case Allow the Practice of Guilt By Association.

The OSI attorneys accuse Michael Schmidt of nothing specific -- but the entire Holocaust in general, and pile on top of that "immorality" because of the lot that life dealt out to the man, who never even counted himself a Nazi. It is purely a matter of guilt by association.

Indeed, what the OSI lawyers are doing in this matter, as can be seen clearly by a reading of the Amended Complaint, is beneath the moral equivalent of

what Schmidt is said to have done. Acting under color of law, they are mercilessly ruining the life of an innocent man. Like guilty Nazis of the day (who should indeed be denaturalized and deported under applicable law), the OSI lawyers are themselves administering blows, under color of law -- but with complete disregard for personal guilt or innocence. Furthermore, they appear to be doing so in the belief that somehow they represent some higher good.

There is no specific charge of wrongdoing against Michael Schmidt. He must not be condemned based on guilt by association. Condemnation because of status is precisely what troubles us about Nazi atrocities.

Yet, the decision of the district court on summary judgment, and the upholding of that decision by the Appeals Court on a 2-1 vote, unless overturned,

will serve to allow the OSI's continued practice of guilt by association.

SUMMARY OF ARGUMENT

The OSI is still engaging in efforts to secure for itself an effective prosecutorial tool -- i.e., court holdings that a person's mere status as a guard is sufficient grounds for a holding of "assistance in persecution." Such a concept is wrong on its face, and is not supported either by legislative history or case law. Nevertheless, in view of decisions like that here appealed by Schmidt, a strong Supreme Court ruling against the concept of guilt by mere status is desperately needed.

The OSI argues that a per se rule on this point is found in the 1981 Supreme Court decision in Fedorenko. Such argument is a gross misapplication of the law.

In fact, the Fedorenko decision is directly concerned with the nature of individual conduct, as certain subsequent cases clearly note. But the OSI needs to be told, and clarification is needed by the courts.

The OSI argues, as it does against Schmidt, that knowledge of persecution is not an essential element of persecution because of race, religion, national origin or political opinion. It bases its arguments on Fedorenko, a decision which clearly fails to support that rash conclusion. Knowledge of persecution must be clearly understood to be a prerequisite to a finding of actionable "assistance in persecution."

Guilt by association is contrary to the American system of law. Court decisions and government prosecutions surely should not be based on concepts and

holdings which are tantamount to guilt by association.

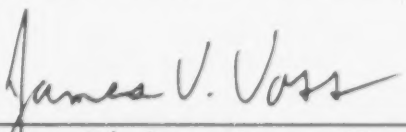
A thorough hearing and ruling on the issues of this case by this honorable Court are necessary to work justice for Michael Schmidt. A hearing and ruling are also necessary at this time to guide the often-divided lower courts, who are faced with the OSI's persistent arguments based on incorrect principles. Stated very directly, a hearing and ruling by this Court are essential as a guide for, or throttle on, the OSI with respect to the handling of its ever-growing docket of cases against aged American citizens.

CONCLUSION

The amici curiae respectfully request that the petition of Michael Schmidt for a hearing of his appeal be granted. They further request that this honorable Court

eventually render a decision clarifying the issues summarized above, which are of great importance to the amici curiae and others who love justice.

Respectfully Submitted,



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Attorneys for the Amici Curiae

APPENDIX

Amici Curiae Letters

RECEIVED
OCT. 1 1991

Our Lady of Lourdes Congregation
3722 S. 58th Street
Milwaukee, WI 53220

September 28, 1991

Attorney Peter Jansson
Jansson & Shupe, Ltd.
425 Main Street
Racine, WI 53403

Dear Mr. Jansson,

As a parish council we have voted to file a friend of the court brief in the Michael Schmidt case because we feel so strongly about the denial of rights to ethnic German conscriptees who had the misfortune to serve as guards during World War II and are not accused of any specific wrongdoing. We believe that they are being punished merely because of their status.

Would you be so kind as to file a brief on our behalf?

Thank you for your kind attention to this matter.

Parish Council of Our Lady of Lourdes Congregation
Brian Croegaert, Co-chairperson

Brian Croegaert

Danube Swabian Association of the U.S.A. Inc.
Verbund der Donauschwaben in den U.S.A. e. V.

Sept. 29,1991

Mr. Peter N. Jansson, Attorney
245 Main Street,
Mezzanine Suite
Racine, WI 53403

Dear Mr. Jansson!

We, the above organization, wish to file a Friend of the Court Brief on behalf of Michael Schmidt, because of the gross wrongs we see in this case and a number of other where our Senior Citizens have been targeted by the OSI.

We would be happy if other organizations join us in the Brief.

Kindly prepare the necessary Amicus Brief and accept our appreciation.

Sincerely

Adam Medal

Adam Medal, President
Danube Swabian Association of the U.S.A. Inc.

BEST AVAILABLE COPY

THE TRICENTENNIAL FOUNDATION

Honoring Over 300 Years of German-American Achievement

Mr. Peter Jansson, Esq.
Jansson & Shupe, Ltd.
245 Main Street
Racine, WI 53403

Oct. 2, 1991

Dear Mr. Jansson,

As an organization we further the interests of the German-American community, indefinite as to number of persons, of the general public. Many of them have paid the ultimate price for Freedom and Democracy for the United States.

We respectfully request you to represent our interests and to file a friend of the court brief in the case of Michael Schmidt, because we feel stronly about the denial of rights to ethnic Germans, who had the misfortune to serve as conscriptees and were assigned to guard duty during World War II and have not been accused of any specific wrongdoing, except of serving on the loseing side.

If there is such-a-thing as justice or morals in our society, than we must raise the question- was Morgenthau and his plan or Eisenhower, as discribed in the Book "Other Losses" by James Bacque, after the War --- or the Pilots during the War over Dresden more morally accountable or responsible than a soldier ordered to pull guard duty in time of War?

Thank you for you interest in this matter,

Sincerely,

H. W. Eberhard

Chairman
Vice President
Secretary
Treasurer
Director

Washington, D.C.
Advisory Board

An IRS-recognized 501(c)(3) non-profit organization founded 1983 in California. Contributions are tax-deductible to the full extent of U.S. tax. Financial report available upon request.

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American Aid Society
of German Descendants

6540 North Milwaukee Avenue – CHICAGO, ILLINOIS 60631

October 3, 1991

Mr. Peter H. Jansson, Attorney
245 Main Street,
Hermanian Suite
Racine, WI 53403

Dear Mr. Jansson:

We, the above organization, wish to file a Friend of the Court Brief on behalf of Michael Schmidt, because of the gross wrongs we see in this case and a number of others where our Senior Citizens have been targeted by the OSI.

We would be happy if other organizations join us in this Brief. Kindly prepare the necessary Amicus Brief and accept our appreciation.

Sincerely,

Hans Gebavi

Hans Gebavi, President
American Aid Society of German Descendants

INSTITUTE FOR
GERMAN AMERICAN
RELATIONS (IGAR)

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FAX. (412) 364-7722

10/2/91

Peter Jansson
Jansson & Shupe, Ltd.
245 Main St.
Racine, WI 53403

Dear Mr. Jansson,

Our organization wishes to submit an amicus curiae brief before the Supreme Court regarding the Michael Schmidt case, using the arguments which we discussed.

We are aware of many cases in which the OSI is using just status as a guard and other strained and wrongful arguments to denaturalize and deport elderly American citizens who are ethnic Germans from Eastern Europe.

Until 3 days ago, we were not aware that we could file such a brief and appreciate your doing so.

Sincerely,

M. Bouvier

Dr. Marianne Bouvier
Executive Director
Institute for German American Relations

MB:al

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 90-3952

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEONID PETKIEWYTSCH,
Petitioner,

v.

IMMIGRATION AND
NATURALIZATION SERVICE,
Respondent.

Petition for Review
of a Deportation Order
of the Board of
Immigration Appeals

Decided and Filed September 30, 1991

Before: MERRITT, Chief Judge; LIVELY, Senior Circuit Judge; and HULL, Chief District Judge.*

LIVELY, Senior Circuit Judge. The question in this case is whether a permanent resident alien who served involuntarily as a civilian guard in a German "labor education camp" during the period of Nazi control and who never personally abused prisoners is subject to deportation under the Immigration and Nationality Act of 1952, as amended, (the Act), 8 U.S.C. § 1101, et seq. More specifically, the question arises under section

*The Honorable Thomas G. Hull, United States District Chief Judge for the Eastern District of Tennessee, sitting by designation.

241(a)(19) of the Act, 8 U.S.C. § 1251(a)(19)(the Holtzman Amendment). The Holtzman Amendment was enacted in 1978; section 103 provides for the deportation of any alien who, under the direction of or in association with the Nazi government of Germany, ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion between March 23, 1933 and May 8, 1945. Holtzman Amendment § 103, Pub. L. No. 95-549, 92 Stat. 2065, codified at 8 U.S.C. § 1251(a)(19).

I.

The facts relating specifically to the petitioner's background and conduct are not disputed by the parties and consistent factual determinations were made by the immigration judge and the Board of Immigration Appeals (the Board).

A.

The petitioner is a 67 year old married male and a native of Poland. The petitioner lived in Poland under Nazi occupation until 1944. In 1944, petitioner, then age 21, fled with his family from Poland to Czechoslovakia to avoid the consequences of battle and occupation by the approaching Russian army. From Czechoslovakia, the petitioner and his family were sent with other refugees to a transit camp in Austria. After arriving in Austria, the family was ordered by the Germans to report to the labor exchange in Kiel, Germany. At Kiel, the family was separated. The petitioner's parents were assigned to a local fish cannery while the petitioner and his twin brother were ordered to report to the Kiel-Hasse labor education camp to serve as civilian guards. The petitioner and his twin brother objected to the assignment but nevertheless reported for duty. Refusing the assignment would have subjected the petitioner to imprisonment or execution.

After reporting to the camp, the petitioner, though serving as a *civilian* guard, was issued a used uniform of a

Gestapo SS member and given a rifle with five rounds of ammunition. The petitioner was instructed on how to escort prisoners to and from work sites and how to clean and load his rifle. His guard duties required him to act as a perimeter guard, to escort prisoners to work sites and, on a rotating basis, to stand guard at the entrance to a bunker where prisoners were interrogated and sometimes mistreated. The petitioner's primary responsibility was to prevent the escape of prisoners and he was under orders to shoot anyone attempting to escape. When not on duty, the petitioner was allowed unescorted liberty outside the camp which he used to visit his family. The petitioner was informed that he would be imprisoned or shot if he disobeyed orders or attempted to run away.

While serving as a civilian guard, the petitioner witnessed frequent mistreatment of prisoners and was aware that some executions took place. However, during his eight-month service as a civilian guard the petitioner never used his rifle, never struck a prisoner and never personally inflicted any form of abuse upon prisoners beyond impeding their escape through his presence as a civilian guard.

At the war's conclusion, the petitioner and his twin brother sought work at local farms. They were quickly apprehended by the British, however, and interned for thirty-four months as suspected war criminals. After his internment, the petitioner was released by the British under "category 5," which meant that he was totally exonerated of any wrongdoing and of all charges against him. In March 1948, the petitioner applied to the Preparatory Commission of the International Refugee Organization to receive benefits as a refugee, which would have certified him for entrance into the United States under the Displaced Persons Act of 1948 (DPA), Pub. L. No. 80-774, ch. 647, 62 Stat. 1009 (1948), as amended, June 16, 1950, Pub. L. No. 81-555, ch. 262, 64 Stat. 219 (1950). However, part II of annex I to the Constitution of the International Refugee Organization (IRO), which was incorporated by reference into the DPA

as enacted in 1948, denied benefits to anyone who could be shown "to have assisted the enemy in persecuting civil populations. . . ." IRO Constitution, annex I, part II § 2(a); DPA § 2(b). The petitioner was denied assistance from the IRO because he had served as a guard at the labor education camp. In 1955, the petitioner applied to the United States Consulate in Hamburg, Germany for an immigration visa under the Immigration and Nationality Act, which then contained no provision denying admission to those who had participated or assisted in Nazi persecutions. On March 9, 1955, the petitioner was issued an immigration visa under the Act by the American Consulate in Hamburg, Germany, and has lived in the United States as a permanent resident since 1955.

B.

The administrative record contains expert testimony regarding the system of camps established by the Nazi regime, their purposes and their organizational control. The most repressive Nazi camps came under the direction the German SS, the organization established by Hitler to suppress groups targeted on the basis of race, religion and national origin. Concentration camps were established prior to the war in order to intimidate and torture those targeted groups perceived as impeding Nazi goals. Concentration camps were used by the SS as permanent institutions of the state and were designed as intimidation instruments for political dissenters, opposition groups and groups in society that the Nazi regime determined to be unworthy of full citizenship. These camps contained many permanent buildings, heavily concentrated inmates and were surrounded with electric wire carrying a lethal charge.

After the outbreak of war, sub-camps of the concentration camps emerged, also controlled by the German SS, which became known as the extermination camps. Consisting of gas chambers, railroad sidings and very little else, extermination camps such as Auschwitz, Treblinka and Buchenwald were intended and used solely

to eliminate Jews and other groups of people deemed inferior by the Nazis.

Forced labor camps were another sub-component of concentration camps, also primarily under the control of the German SS. Forced labor camps were temporary outcamps typically set up near concentration camps or near a particular work site to permit exploitation of the labor available from the concentration camp for economic purposes. These camps were also fenced, but much less extensively than concentration camps, and the fencing typically did not contain a lethal charge.

This appeal involves a labor education camp. Labor education camps were initially created as repositories for foreign laborers involuntarily deported into Germany to fill the acute labor shortage created by the massive mobilization for war. However, the labor education camps also quickly became used as punishment camps for workers accused of slacking, other labor infractions or other generalized violations of state policy, such as sexual contact with German nationals, minor crimes, practicing religion in a language other than German or failing to wear a special badge designating one as Jewish or Polish. Labor education camps involved much less security than other camps and typically involved sentences of relatively short duration.

At the Kiel-Hasse labor education camp there was no fence nor any other feature of a concentration or extermination camp and the normal period of incarceration was fifty-six days. Physical abuses, malnutrition and overcrowded conditions were nevertheless prevalent and former inmates testified to interrogations, torture and executions. Expert witnesses testified that documents from Kiel-Hasse revealed that guards were prohibited from beating prisoners at Kiel-Hasse. These witnesses expressed the opinion that the inmates experienced persecution primarily at the hand of SS guards present at the camp and more senior Gestapo officials rather than at the hand of civilian guards such as

the petitioner.

II.

In July 1985 the United States Immigration and Naturalization Service (INS) issued an Order to Show Cause charging that the petitioner was deportable, among other provisions, under section 103 of the Holtzman Amendment, for assisting or otherwise participating in Nazi persecution. The petitioner denied the allegations in the show cause order material to deportation under the Holtzman Amendment. In April 1986 an eight-day evidentiary hearing was held before an immigration law judge on the issue of deportability. During the hearing the testimony of numerous witnesses was admitted, including historians with expertise in the operation of Nazi camps, former inmates of Kiel-Hasse, government officials and family members of the petitioner.

In March 1987 the immigration judge issued a brief opinion that ordered the deportation proceedings against the petitioner terminated. The immigration judge found that the petitioner had not personally engaged in any persecutorial acts and that the petitioner's "wrongful conduct, at most, was his acceptance under duress of his duties as a civilian labor education camp guard." Noting the petitioner's young age at the relevant time period, the immigration judge concluded that the petitioner "was equally a victim of the times that he lived in. . . ." The government appealed the immigration judge's opinion to the Board.

The Board rendered a decision in May 1990 reversing the decision of the immigration judge and ordering deportation. After a thorough review of the evidence, the Board agreed with the factual findings deemed critical by the immigration judge that the petitioner's service as a civilian guard was involuntary and that the petitioner had not personally engaged in any acts of abuse. The Board in fact described the petitioner as "a rather reluctant guard who performed his duties as ordered in order to escape

imprisonment or death." Unlike the immigration judge, however, the Board found these factual determinations to be without legal relevance in applying the Holtzman Amendment. The Board concluded that only the "objective *effect*" of the petitioner's conduct controlled (emphasis in original) and that the "objective effect" of his service as a civilian guard was to assist the Nazis in their persecution of those within Kiel-Hasse by preventing their escape.

The Board found the key issue presented by the case to be whether Kiel-Hasse was a place where persecution occurred due to race, nationality, religion or political opinion, as is required for deportation under the Holtzman Amendment. After reviewing the policies served by the labor education camps and the practice of using the camps as an enforcement mechanism to carry out labor decrees directed against foreign workers deemed politically suspect, racially unreliable or of an inferior national origin, the Board concluded that Kiel-Hasse was a repository for the persecution of people based on race, nationality and political opinion. The Board further found that persecution took place in Kiel-Hasse, not only by the fact of involuntary confinement, but also by deprivation, torture and executions. The Board thus concluded that the petitioner was deportable under the Holtzman Amendment because of his duties as a guard at a camp where persons were persecuted based upon race, religion, national origin or political opinion.

III.

The petitioner has challenged the factual finding of the Board that Kiel-Hasse was a place of persecution based upon race, religion, national origin or political opinion. However, the record contains evidence of deprivations, torture and executions at Kiel-Hasse that leaves no question but that it was a place of persecution. Additionally, petitioner's contention that internment at Kiel-Hasse required the commission of an act by the inmate, and thus that the persecution in the camp was

based upon an infraction rather than upon race, religion or national origin is unpersuasive. While German nationals were not immune from labor education camp imprisonment for genuine labor–violations, the record clearly demonstrates that the "infractions" resulting in labor education camp imprisonment were predominantly based upon race and nationality, such as the refusal of Jews, Poles or other eastern workers to wear the insignia assigned to them on their clothing. Persecution stemming from such "infractions" must, therefore, be considered to be based on race, religion, national origin or political opinion. We agree with the Board's decision in this regard.

IV.

This brings us to the principal issue presented by this appeal: Whether the Board correctly construed the Holtzman Amendment to require the deportation of one who involuntarily served as a labor education camp civilian guard to avoid imprisonment or death and who never personally committed any acts of abuse against prisoners.

The Holtzman Amendment was added to the Act in 1978. Section 103 of the amendment provides, in pertinent part:

> Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who-
>
> * * *
>
> (19) during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with-
>
> (A) the Nazi government of Germany,
>
> (B) any government in any area occupied

> by the military forces of the Nazi government of Germany,
>
> (C) any government established with the assistance or cooperation of the Nazi government of Germany, or
>
> (D) any government which was an ally of the Nazi government of Germany,
>
> ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion; . . .

8 U.S.C. § 1251(a)(19).

A.

Whether § 1251(a)(19) requires the result reached by the Board is clearly a question of statutory construction. The standard of review applicable to questions of statutory construction was stated by the Supreme Court in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987): " ' The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. [Citing cases.] If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.' " *Id.* at 447-48 (quoting *U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)). We discuss briefly the development of the relevant legislation as a background to our more specific treatment of the issue before the court.

B.

Congress passed the DPA in 1948 as a means of temporarily eliminating restrictive immigration quotas and providing relief to the vast numbers of persons displaced by the ravages of World War II by permitting their

entrance into the United States for permanent residence. As initially enacted, the DPA expressly prohibited the issuance of a visa "to any person who is or has been a member of, or participated in, any movement which is or has been hostile to the United States or the form of government of the United States." DPA § 13, Pub. L. No. 80-774, ch. 647, Stat. 1009, 1014 (1948). In addition, § 2(b) of the DPA limited the application of the DPA to those "who [were] the concern of the International Refugee Organization" under the terms of that organization's constitution. Congress thus incorporated by reference the provision of annex I, part II of the IRO Constitution which listed the categories of persons who were not of concern to the IRO. Such persons were described in the IRO Constitution as follows:

> 2. Any other persons who can be shown:
>
> (a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or
>
> (b) to have voluntarily assisted the enemy forces since the outbreak of the Second World War in their operations against the United Nations.[1]
>
> ---
>
> [1]Mere continuance of normal and peaceful duties, not performed with the specific purpose of aiding the enemy against the Allies or against the civil population of territory in enemy occupation shall not be considered to constitute "voluntary assistance".

IRO Constitution, Chapter XXIX, annex I, part II § 2(a) & (b)(footnote in original).

Congress subsequently amended § 13 of the DPA in 1950 to prohibit issuance of a visa "to any person who

advocated or assisted in the persecution of any person because of race, religion, or national origin. . . ." June 16, 1950 Amendment to DPA, Pub. L. No. 81-555, ch. 262, 64 Stat. 219, 227 (1950). Thus, as enacted in 1948 and as amended in 1950, the DPA effectively blocked immigration to the United States of those who assisted in persecution.

The Immigration and Nationality Act as adopted in 1952 did not proscribe issuance of visas to those who had assisted in persecution during the war. Section 340(a) of the Act, 8 U.S.C. § 1451(a), did provide authority to denaturalize and revoke the citizenship of one who gained admission to the United States either illegally, by concealment of a material fact, or by willful misrepresentation. Thus, one who entered the United States under the DPA by concealing assistance or participation in persecution remained subject to deportation under § 340(a) of the Act. However, because the Act contained no restrictive provision similar to the DPA, a person who assisted in persecution but who entered the United States pursuant to the Act legally and without concealment or misrepresentation was not subject to deportation under § 340(a).

This loophole in the Act was remedied by section 103 of the 1978 Holtzman Amendment which added to the permanent immigration laws of the United States a provision for the deportation of aliens who participated in Nazi-directed persecution of individuals "because of" race, religion, national origin or political opinion. The Holtzman Amendment thus provided an independent basis for deporting immigrants who entered the United States lawfully despite their participation or assistance in persecution of civilians during the war.

C.

Although the parties briefed the case extensively and argued it fully, their positions can be stated rather succinctly. The petitioner contends that this is a case of

first impression because no court has decided that a resident alien who has been found to have served involuntarily as a guard in a labor education camp is deportable under the Holtzman Amendment. He argues that these two factors - involuntariness and guard duty in the least restrictive type of Nazi detention camp - demonstrate that he was not a war criminal. The legislative history of the Holtzman Amendment makes it clear, he asserts, that it was not intended to apply to a person with his wartime record.

The government responds that neither of the factors cited by the petitioner makes any difference. The cases, particularly *Fedorenko v. United States*, 449 U.S. 490 (1981), make it clear, according to the government, that the petitioner is deportable because Kiel-Hasse was a "place of persecution" and the petitioner assisted in the persecution of individuals "because of race, religion, national origin, or political opinion." It is enough, the government argues, that the petitioner wore a uniform and carried a loaded weapon and his job was to prevent the escape of those confined and subject to persecution.

It is clear that the case is unique in at least one respect: the immigration judge and the Board agreed that the petitioner acted involuntarily and that the record contains no evidence that the petitioner personally abused or mistreated any inmate. Many of the cases we have examined contained sharply conflicting evidence of the alien's personal participation in persecution, and deportability often turned on a court's resolution of such evidence. Here, although a number of former inmates of Kiel-Hasse testified, none was able to relate an incident in which the petitioner abused anyone.

V.

The Holtzman Amendment, although an independent legislative act, was designed to "establish within the permanent U.S. immigration law a provision which . . . appeared previously in [the DPA]." H.R. Rep. No. 95-

1452, 95th Cong., 2d Sess. at 3, *reprinted in* 1978 U.S. Code Cong. & Admin. News 4700, 4702. Thus, our starting point is the Supreme Court's construction of the DPA in *Fedorenko*. We then examine decisions applying the teachings of *Fedorenko* to cases under the Holtzman Amendment.

A.

Fedorenko involved denaturalization proceedings against Feodor Fedorenko. Fedorenko gained permanent admission to the United States in 1949 under the 1948 DPA. During the war, Fedorenko, who was a Ukranian, served in the Russian army. He was captured by the Germans and required to serve as an armed guard at the Nazi extermination camp, Treblinka. 449 U.S. at 494. Fedorenko denied personal involvement in the atrocities at Treblinka, but admitted that he followed orders by shooting in the general direction of escaping inmates during an uprising. *Id.* at 500. In his application for a visa under the DPA, Fedorenko deliberately concealed his service as a guard at Treblinka. *Id.* at 496. In 1969 Fedorenko applied for citizenship, again concealing his service at Treblinka, and became a United States Citizen. *Id.* at 497. Arguing that his service at Treblinka constituted "assist[ance] [to] the enemy in persecuting civil populations" under the 1948 DPA, the government instituted a denaturalization action against Fedorenko in 1976 under section 340(a) of the Act, 8 U.S.C. § 1451(a) for concealment of material evidence.

The Supreme Court held that Fedorenko's involuntary service as an armed guard at Treblinka disqualified him as a matter of law from admission to the United States under the DPA. *Id.* at 514. In so ruling, the Supreme Court specifically rejected the argument that the DPA required the conduct constituting assistance in persecution to be voluntary. *Id.* at 512. In place of interpreting the DPA to include a voluntariness requirement, the Supreme Court directed lower courts to focus "on whether particular conduct can be considered assisting the *persecution* of

civilians." *Id.* at n.34 (emphasis in original). The Supreme Court offered some assistance to lower courts in making this difficult determination by describing a continuum of conduct:

> Thus, an individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians.

Id. Having described the continuum, the Court noted that "[o]ther cases may present more difficult line-drawing problems. . . ." *Id.*

B.

The "line drawing" in cases under the Holtzman Amendment has been particularly difficult and has produced conflicting results. In *Schellong v. INS*, 805 F.2d 655 (7th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987), the court of appeals applied the Holtzman Amendment to affirm the deportation of a person who voluntarily joined a special commando unit of the Nazi SS and served as an armed guard at two concentration camps. *Id.* at 656-57. There was no evidence, however, that Schellong personally engaged in physical abuse of prisoners while serving as a guard. *Id.* at 657. The court noted that it had previously held in *United States v. Kairys*, 782 F.2d 1374 (7th Cir.), *cert. denied*, 476 U.S. 1153 (1986), that service as a guard at a concentration camp equaled persecution under the DPA without proof of personal involvement in atrocities. *Id.* at 660. Concluding that the purposes of the two statutes were

identical, the court found that proof of Shellong's service as a guard at a concentration camp established that he had "assisted in persecution for purposes of Section 1251(a)(19)" and therefore was deportable. *Id.* at 661. The court specifically rejected the argument that an individual must have actively or personally participated in persecution to be deportable under the Holtzman Amendment as inconsistent with *Fedorenko*. *Id.* This holding was reaffirmed in *Kulle v. INS*, 825 F.2d 1188 (7th Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988).

Another court reached a different conclusion in *Laipenieks v. INS*, 750 F.2d 1427 (9th Cir. 1985), a deportation proceeding under the Holtzman Amendment against a native of Latvia. The petitioner had served voluntarily as a member of the Latvian Political Police, an organization formed to investigate and arrest individuals who participated in Soviet atrocities against Latvian citizens during the period of Soviet domination which preceded Nazi occupation. *Id.* at 1429. Although Laipenieks admitted slapping Soviet sympathizers taken as prisoners, the court of appeals found that the INS failed to establish by clear and convincing evidence that Laipenieks' individual conduct had been motivated by the political opinion of the prisoners. Relying on the legislative history of the Holtzman Amendment, the court held that deportability under § 1251(a)(19) "may only be sustained when the evidence establishes that the individual in question *personally* ordered, incited, assisted, or otherwise participated in the persecution of individuals." *Id.* at 1431 (emphasis added). Relying on note 34 in *Fedorenko* and the legislative history of the Holtzman Amendment, the court concluded that the proper analysis under the Holtzman Amendment was whether there was "proof of *personal active assistance* or participation in persecutorial acts. . . ." *Id.* at 1432 (emphasis added).

On the other hand, the court in *Maikovskis v. INS*, 773 F.2d 435 (2d Cir. 1985), *cert. denied*, 476 U.S. 1182 (1986), found that personal motivation was immaterial. Maikovskis's application for admission to the United

States under the 1948 DPA concealed his voluntary service as the Chief of Police in a Nazi-dominated precinct in Latvia. *Id.* at 438. In response to the death of two Latvian police officers at the hands of Soviet partisans in the village of Audrini, Maikovskis ordered his Latvian police to join with German soldiers in arresting all of the Audrini villagers, approximately 200-300 persons, and in burning the village to the ground. *Id.* Maikovskis denied involvement in the subsequent executions and murder of almost all of the villagers. *Id.* Nevertheless, his personal participation in the persecution of civilians was clearly established. Maikovskis argued, however, that the government had failed to produce evidence that his conduct was *personally* motivated by the villager's political opinion. *Id.* at 445. Citing to the language, purpose and legislative history of the Holtzman Amendment, the court of appeals held that the personal motivation of the alien for assisting in persecution is immaterial when it is shown that the Nazi persecution in which the alien participated took place because of race, religion, national origin or political opinion. *Id.* at 445-46.

VI.

Although the Holtzman Amendment was designed to fill a loophole in the permanent immigration law and its language is similar to that found in the DPA, the legislative history indicates an intention, at least in part, to accomplish a different purpose. The DPA was designed to provide relief to the multitude of displaced persons and refugees in Europe after the end of World War II. The problem was one of immense proportions and there was need for immediate action. These factors doubtless account for the absence of any legislative history addressing the provision in the 1948 DPA excluding persons who had assisted in persecution and for the decision merely to incorporate portions of the IRO constitution. Thirty years later, when the Holtzman Amendment was adopted, it had become clear that some war criminals, actual perpetrators of the Holocaust and

other war crimes, had entered this country under the 1952 Act. The Holtzman Amendment provided the basis for their deportation.

A.

The Holtzman Amendment's legislative history contains a clear and repetitive message that the amendment was intended to deny "sanctuary in the United States to Nazi *war criminals*" 124 Cong. Rec. 31,647 (1978)(statement of Rep. Holtzman) (emphasis added), and that the "bill applies to any person who committed *war crimes* under the Nazis. . . ." *Id.* at 31,649 (emphasis added). The specific discussion on the House floor in which Representative Holtzman explained the purpose and scope of the bill demonstrates that the focus of the bill's intent centers on Nazi war criminals. Indeed, reference to "Nazi war criminals" or "war criminals" is made no less than nineteen times during the short discussion in which the purpose and reach of the bill is explained. See 134 Cong. Rec. 31,646-50 (1978). At one point Representative Holtzman explained the bill as follows: "The bill as reported here contains an amendment that limits the language of the bill *solely to those persons who engaged in war crimes*. . . ." 134 Cong. Rec. 31,647 (1978)(emphasis added). Again she stated, "[T]he bill is intended to cover *active participation* and not mere acquiescence by the population as a whole." *Id.* at 31,649 (emphasis added). Representative Holtzman was joined in explaining the bill by another subcommittee member, Representative Eilberg, who stated the bill's purpose:

> Mr. EILBERG. [T]he purpose of this bill, which is cosponsored by all of the members of the Subcommittee on Immigration, Citizenship and International Law, is to prevent the entry into, as well as facilitate the deportation from the United States of *aliens who have engaged in persecution* based on race, religion, national origin or political opinion under the Nazis.

Id. at 31,647 (emphasis added). Mr. Eilberg and Ms. Holtzman each went on to make several additional references regarding the bill's applications to those who *engaged* in war atrocities. *Id.* at 31,647-48. Representative Eilberg also stated:

> [T]hat dreadful period in the history of mankind should forever serve as a tragic reminder to all civilized people of the terrible extremes to which an entire nation can be led by a small but highly organized group of demented and *ruthless leaders*. This bill addresses itself to the *members of that group--to the perpetrators* of the "Holocaust."

Id. at 31,647 (emphasis added).

We appreciate the fact that statements in floor debate often do not truly reflect the purpose of an act of Congress. Nevertheless, this bill was the work of Representative Elizabeth Holtzman, and her statement of its purpose is entitled to careful consideration, particularly in view of the similar statements found in the committee report. Representative Eilberg's statements concerning the intent of the subcommittee which first approved the Holtzman Amendment is equally persuasive.

The Holtzman Amendment's purpose of reaching war criminals is further clarified by statements in the legislative history indicating the degree of participation in persecution necessary to come within the Holtzman Amendment. The statement of the Holtzman Amendment's purpose reads:

> Purpose of the Bill
>
> The purpose of the bill is to exclude from admission to the United States *aliens who have persecuted* any person on the basis of race, religion, national origin, or political opinion and to facilitate the deportation of such aliens who have been admitted into the United States.

H.R. Rep. No. 95-1452, 95th Cong., 2d Sess. at 1, *reprinted in* 1978 U.S. Code Cong. & Admin. News 4700. This language appears to require active participation in persecution going beyond "assistance." In discussing the Holtzman Amendment's application, the House Report goes on to state that "it is important to stress that the conduct envisioned must be of a deliberate and severe nature and such that is condemned by civilized governments, . . ." *Id.* at 7, 1978 U.S. Code Cong. & Admin. News at 4706.

B.

Fedorenko established that the DPA provision making persons who assisted in Nazi persecutions ineligible for immigration visas did not depend upon whether the visa applicant had acted voluntarily. Thus, standing alone, the fact that the petitioner in this case acted involuntarily would not have rendered him eligible for entry into the U.S. under the DPA. If the Holtzman Amendment is to be given precisely the same meaning as the DPA, we agree that involuntariness alone would not preclude deportation under section 1251(a)(19). We need not address the difficult question of the effect of involuntariness, standing alone, under the Holtzman Amendment, however, for after disposing of the voluntariness issue, the *Fedorenko* court added the frequently quoted footnote 34.

In the footnote, the Supreme Court stated that the proper focus of a court faced with the problem of limiting the DPA's exclusionary language only to those whom Congress intended to exclude should be upon "whether particular conduct can be considered assisting in the *persecution* of civilians." 449 U.S. at 512 n. 34 (emphasis in original). Fedorenko was found subject to denaturalization for several reasons. He was "a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on

orders from the commandant of the camp. . . ." *Id.* Obviously, Fedorenko's most egregious conduct was shooting at escaping inmates. The petitioner in the present case, Petkiewytsch, did not ever fire his rifle or otherwise abuse or attempt to injure an inmate.

If, as the Supreme Court stated, the focus under the DPA should be on the "particular conduct" of the immigrant, then given the legislative history of the Holtzman Amendment, that focus should be even more searching under § 1251(a)(19). Although Petkiewytsch wore a uniform and carried a rifle, the Board found that he was at all times a reluctant civilian guard, once himself imprisoned for failing to perform his guard duties diligently. The camp where he served was the least punitive of all types of Nazi camps. The Board also found that the petitioner served under duress and that he was told he would be shot if he attempted to escape. He never personally engaged in acts of persecution, and was released by the British authorities, who interned him as a suspected war criminal, upon a finding that the charges could not be sustained. His "particular conduct" just does not fit the description of a "Nazi war criminal" or a "person[ ] who engaged in war crimes," repeatedly described as the class sought to be made deportable by the Holtzman Amendment.

Given all the circumstances disclosed by this record, we do not believe that *Fedorenko* requires a finding that Petkiewytsch is subject to deportation under § 1251(a)(19). Deporting this petitioner would not further the goal of the Holtzman Amendment and would carry out no discernable policy of the United States.

VII.

In addition to seeking deportation under the Holtzman Amendment, the Order to Show Cause alleged that the petitioner was also subject to deportation under 8 U.S.C. §§ 1251(a)(1) & (2). Subsection (a)(1) provides for the deportation of one who was excludable by the law existing

at the time of entry into the United States, and subsection (a)(2) provides for the deportation of one who entered the United States in violation of Chapter 12 of the Immigration and Nationality Act. The Order to Show Cause alleges that petitioner was excludable from entry into the United States under subsection (a)(1) and that his entry was illegal under subsection (a)(2). The gist of this charge is that Petkiewytsch had procured documentation for entry into the United States "by fraud or willfully misrepresenting a material fact[,] . . ." 8 U.S.C. § 1182(a)(19), and thus was excludible and his entry illegal.

The Board did not reach this charge, and the parties have not raised it here. We agree with the *Maikovsis* court that when an alien has made misrepresentations, "the materiality of the misrepresentations is established where the government shows that disclosure of the concealed information probably would have led to the discovery of facts warranting the denial of a visa." 773 F.2d at 442. In view of our conclusion that Petkiewytsch's service for eight months as a guard at Kiel-Hasse did not subject him to deportation, we do not believe his failure to disclose that conduct related to a "material fact." Furthermore, it would be hard to conclude that the petitioner's failure to disclose his post-war internment was a "willful[ ] misrepresentation" given his complete exoneration by the British authorities.

The petition for review is granted and the decision of the Board of Immigration Appeals is reversed.